23-376

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 652. 356 76

MILTON F. LAMASTER, PLAINTIFF IN ERROR,

vs.

JOHN W. KEELER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED OCTOBER 9, 1884.

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1 Pleas before the Honorable Elmer S. Dundy, judge of the district court of the United States for the district of Nebraska, sitting in the circuit court of the United States for the eighth judicial circuit and district of Nebraska, at the term of January, A. D. 1884.

Be it remembered that on the 17th day of July, 1882, a petition was filed in the office of the clerk of said circuit court, which said petition is in words and figures following, to wit:

Petition.

In the United States Circuit Court, District of Nebraska.

JOHN W. KEELER *vs.* MILTON F. LAMASTER.

The said plaintiff says:

1. That he is a citizen and resident of the State of Iowa, and the said defendant is a citizen and resident of the State of Nebraska, and the property hereinafter mentioned is of the value of $5,000 and over.

2. At the term of November, 1875, of this court, in a certain cause then depending therein wherein Charles W. Seymour and William W. Wardell were plaintiffs and William P. Young was defendant, the said plaintiffs recovered against said defendant $7,500 and costs; that on the 2nd day of December, 1875, a bond was filed in said cause, signed by John Irvin, Jane Y. Irvin, W. T. Donavan, Nathan F. Moffat, and Milton F. Lamaster, whereby the said John Irvin, Jane Y. Irvin, W. T. Donavan, Nathan F. Moffat, and Milton F. Lamaster acknowledged themselves security for said William P. Young, for the payment of said judgment, interest, and costs, to be paid nine months from the rendition thereof; and thereupon
2 said Young applied to the clerk of this court to stay the issue of execution on said judgment; whereupon said clerk approved said bond, and the sureties thereto, and among them said Lamaster, and refused to and would not nor did issue execution on said judgment, which bond was duly recorded by said clerk in a book kept by him for the purpose, and made the proper entries and index in the proper judgment docket so as to make the same a judgment against the said parties who signed said bond and a lien as such upon their real estate in this district.

3. The said judgment still remaining in force, $4,744.31 being due and unpaid thereon, and the said Lamaster being seized in fee of the premises hereinafter mentioned on the 14th of April, 1881, an execution was issued by said clerk out of said court, and under the seal thereof, in said action, directed to the marshal of this district, commanding him that of the goods and chattels and for want thereof of the lands and tenements of the said parties who signed said bond, and against whom on account thereof said judgment was extended as aforesaid, he cause to be made $4,744.31, which writ was in due form of law; said marshal, upon due proceedings in that behalf, levied the said writ upon said lands—that is to say, lot nine, in block fifty-six, in the city of Lincoln, in this district—and on the

17th of May, 1881, sold the same to Thomas Ewing for $5,600.00 which sum said Ewing then and there paid to said marshal. The said marshal having returned the said writ into the office of the clerk of this court, with his proceedings endorsed thereon, the plaintiffs in said writ, at the term of November, 1881, of this court, duly moved the court to confirm the said sale, and the said Milton F. Lamaster at the same time duly moved the said court to set the said sale aside; in support of which last-mentioned motion the said plaintiff on the one side filed affidavits in support of the said sale, and the said Lamaster filed affidavits alleging facts and circum-
3 stances on account of which he insisted that the said sale should be set aside.

And in his said motion papers he alleged as reasons why the sale should be set aside that the aforementioned bond was not his bond, act, or deed; that he did not justify as to his sufficiency as surety on said bond, or otherwise comply with the statute requiring his affidavit in respect of his sufficiency; that he was not approved as such surety; that the said court had not jurisdiction to issue said execution against his property, or render any judgment against him, or entertain or take any proceedings against him or his property as such surety, or as bound by the proceedings against him aforesaid; that there was no judgment upon which said execution could be lawfully issued; that there was no law or rule of the said court authorizing the issuing of said execution against him as aforesaid.

And the said motions coming on to be heard before the court, counsel appearing for the said parties urged to the court counsel for said Lamaster that each and every of his objections were good and valid, and ought therefore to be sustained and the said sale set aside; the counsel for the said plaintiff on the other hand insisting to the court that none of the said objections were good, and that the sale ought to be confirmed. And the court, upon a consideration of each and every of the said objections, found, determined, and held that no one of the said objections was good and valid, and particularly that the statute of this State had been duly adopted into practice of this court, so that all of the said proceedings against the said Lamaster and his property were effectual to bind his estate aforesaid, and that the said sale ought to be confirmed, and thereupon ordered that the same be confirmed, and the marshal execute a deed accordingly.

4 And the said court did further order that the proceeds of the said sale, which had been deposited in the registry of the court pending the said motions, should be paid to the plaintiffs in said execution, which was accordingly done. Nor has the said Lamaster taken any proceedings to avoid the said orders or to have the same set aside or reversed or modified.

At the term of November, 1881, of this court, it, by its order in that behalf, duly made and entered [and] confirmed said sale, and directed said marshal to make to said Ewing his deed in due form of law conveying said premises to him.

On the 9th of May, 1882, the said marshal, Ellis L. Bierbower, under and in pursuance of said order made to said Ewing his

deed, dated on said day, in due form of law, reciting said judgment and other proceedings conveying said premises to said Ewing, whereupon and by virtue whereof the said Ewing became and was seized in fee of said premises and entitled to the possession thereof.

4. On the 17th day of July, 1882, by his certain deed of conveyance, dated on said day, by the said Ewing made to this plaintiff, he, the said Ewing, conveyed said premises to this plaintiff in fee, whereupon and by virtue of said deed he became and is entitled to the possession of the premises above described.

5. The said defendant, Milton F. Lamaster, who duly signed said bond, and against whom the said execution issued and proceedings aforesaid were had, unlawfully keeps said plaintiff out of possession of said premises.

6. The said defendant has received for and on account of the rents and profits of said premises $3,000.

Wherefore the said plaintiff prays judgment for the possession of said premises, and for $3,000 for the rents thereof, and costs of this action.

J. M. WOOLWORTH &
HULL & STEARNS,
Att'ys for Plaintiff.

UNITED STATES OF AMERICA, }
District of Nebraska, } ss:

R. D. Stearns, being duly sworn, says he is one of the attorneys for the plaintiff in the above action; that said plaintiff is a non-resident of and absent from this district, and the facts stated in the above petition are true, as he verily believes.

R. D. STEARNS.

Subscribed in my presence and sworn to before me this 17th day of July, 1882.

F. E. McCRARY, *D. C.*

Upon the back of said petition appear endorsements in words and figures following, to wit: No. 245. F. United States circuit court, district of Nebraska. John W. Keeler *vs.* Milton F. Lamasters. Petition. Filed July 17th, 1882. Elmer D. Frank, clerk, by F. E. McCrary, D. C. J. M. Woolworth, pl'ff's att'y.

Thereupon, afterwards, to wit, on the 21st day of August, 1882, a plea to jurisdiction was filed in said case, which said plea to jurisdiction is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

JOHN W. KEELER, Plaintiff, *vs.* MILTON F. LAMASTER, Defendant.

Now comes the defendant, Milton F. Lamaster, and for plea to the jurisdiction of this court herein says that the court ought not to take cognizance of or sustain or determine this action, because he says that the said alleged conveyance of the real estate in contro-

versy from said Thomas Ewing to said plaintiff was a mere colorable and collusive conveyance made only for the purpose of enabling the plaintiff to commence and maintain an action in this
6 court for the recovery of the said real estate and the rents and profits thereof, and to enable this court to take jurisdiction thereof; that at the time of said alleged conveyance the said Thomas Ewing and this defendant both were, and both still are, citizens and residents of the State of Nebraska, all which facts hereinbefore alleged were at the time thereof well known to said plaintiff, and he and the said Thomas Ewing so as aforesaid colluded together for the purpose aforesaid.

That said plaintiff has not nor does he claim to have any title to or interest in said real estate or in said rents and profits, except such, if any, as he derived from and by virtue of the said deed of conveyance.

That the said Thomas Ewing is the real party in interest in this action, which is commenced and prosecuted by him and for his use and benefit in the name of the plaintiff.

That said alleged conveyance was and is a fraud upon the jurisdiction of this court, and this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court, and the said plaintiff has been improperly and collusively made a party for the purpose of creating a case cognizable under the act of Congress relating to the jurisdiction of this court, and this the defendant is ready to verify.

Wherefore he prays judgment if this court will take further cognizance of or sustain this action.

E. WAKELEY, MASON AND WHEDON,
Att'ys for Plaintiff.

STATE OF NEBRASKA, }
Douglas County, } *ss:*

Milton F. Lamaster, the defendant, being duly sworn, says
7 that he believes the facts stated in the foregoing plea to be true.

MILTON F. LAMASTER.

Sworn to before me and signed in my presence, this 21st day of August, A. D. 1882.

[SEAL.] CHARLES P. EDWARDS,
Notary Public.

Upon the back of said plea to jurisdiction appear endorsements in words and figures following, to wit: No. 245—F. U. S. circuit court, district of Nebraska. John W. Keeler *vs.* M. F. Lamaster. Plea to jurisdiction. Filed Aug. 21, 1882. Elmer D. Frank, clerk. E. Wakeley, Mason & Whedon, for def't.

Thereupon, afterwards, to wit, on the 8th day of September, 1882, a reply was filed in said case, which said reply is in words and figures following, to wit:

Reply.

United States Circuit Court, District of Nebraska.

JOHN W. KEELER *vs.* MILTON F. LAMASTER.

Now comes the above-named plaintiff, and, replying to the plea to the jurisdiction of this court filed herein by defendant, denies each and every allegation in said plea contained save and except that, at the time of the conveyance of the real estate in controversy from said Thomas Ewing to plaintiff, the said Ewing and the defendant were and still are citizens and residents of the State of Nebraska.

J. M. WOOLWORTH,
Pl'ff's Att'y.

DISTRICT OF NEBRASKA, *ss:*

J. M. Woolworth, being sworn, says: That he is the attorney for the plaintiff in the above action; that said plaintiff is a non-resident of and absent from said district of Nebraska, and that the facts stated in the above reply are true, as he verily believes.

J. M. WOOLWORTH.

8 Subscribed in my presence and sworn to before me, this 5th day of September, 1882.

[SEAL.] J. P. ENGLISH,
Notary Public.

Upon the back of said reply appear endorsements in words and figures following, to wit: No. 245—F. U. S. circuit court, district of Nebraska. John W. Keeler *vs.* Milton F. Lamaster. Reply to plea to jurisdiction. Filed Sept. 8th, 1882. Elmer D. Frank, clerk, by F. E. McCrary, D. C.

Thereupon, afterwards, to wit, on the 24th day of November, 1882, plea and answer was filed in said case, which said plea and answer is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

JOHN W. KEELER, Plaintiff, *vs.* MILTON F. LAMASTER, Defendant.

Now comes the defendant, Milton F. Lamaster, and for plea to the jurisdiction of this court herein says that the court ought to take cognizance of or sustain or determine this action, because he says that the said alleged conveyance of the real estate in controversy, from said Thomas Ewing to said plaintiff, was a mere colorable and collusive conveyance made only for the purpose of enabling the plaintiff to commence and maintain an action in this court for the recovery of the said real estate, and the rents and profits thereof, and to enable this court to take jurisdiction thereof. That, at the time of said alleged conveyance, the said Thomas Ewing and this defendant both were, and both still are, citizens and residents of the State of Nebraska; all which facts hereinbefore alleged were at

the time thereof well known to said plaintiff, and he and the
9 said Thomas Ewing so as aforesaid colluded together for the purpose aforesaid.

That said plaintiff has not, nor does he claim to have, any title to or interest in said real estate, or in said rents and profits, except such, if any, as he derived from and by virtue of the said deed of conveyance.

That the said Thomas Ewing is the real party in interest in this action, which is commenced and prosecuted by him and for his use and benefit in the name of the plaintiff.

That said alleged conveyance was and is a fraud upon the jurisdiction of this court, and this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court, and the said plaintiff has been improperly and collusively made a party for the purpose of creating a case cognizable under the act of Congress relating to the jurisdiction of this court, and this defendant is ready to verify.

Wherefore he prays judgment if this court will take further cognizance of or sustain this action.

And for answer to the petition herein, and by leave of court subject to the plea and objection aforesaid, and not waiving the same, the defendant states as follows:

1. He denies that the said instrument, purporting to be and which is alleged in the petition to have been a bond, was the bond, contract, or agreement of this defendant, although his signature was affixed and subscribed thereto. And he says that he signed said instrument, and signed and verified a justification thereon as a surety thereto, while the same was in the hands, possession and control of one John Irwin, as the agent of said William P. Young, and long before the same had been presented to or seen by the clerk of said court in which said judgment was rendered, but did so upon the express condition that, before the same should be filed or used
10 or presented to the clerk as a stay bond, two certain persons other than those who, at any time, signed or executed the same should also sign and execute the same and make justification thereto, but neither thereof ever did sign or execute the same.

That afterwards, the said condition not having been complied with, and said instrument still remaining in the hands, possession, and control of said Irwin as aforesaid, and not having been presented to or seen by said clerk, the defendant went to said Irwin and required that his name be erased from the said instrument, and notified said Irwin, as such agent, that he, the said defendant, altogether withdrew from the said bond, and that he would not be a surety thereon, and revoked any and all authority which he had before then given to said Irwin, or to said Young, or to any person to present the said instrument to the said clerk, or make use of the same in any manner whatever, as this defendant's bond, contract, or agreement; and thereupon it was expressly agreed between this defendant and said Irwin, as such agent as aforesaid, that the same should not be so presented or so used, and thereupon, for the purpose and with the intent of preventing any such presentation or

use of the same, the defendant took said instrument, intending to erase therefrom his signature so affixed thereto, but, by inadvertence and oversight, instead of erasing such signature so affixed to the body of said instrument, he erased his signature, which was affixed to his affidavit of justification, appended to said instrument, believing and intending such erasure to be the erasure and cancellation of his signature to said bond or instrument, being at the time forgetful of, or inattentive to the fact, that his signature was to both the bond and the affidavit, and in that condition said bond or instrument was presented to and filed by the clerk aforesaid. And the defendant says that he, the said clerk, and the plaintiffs
11 recovering said judgment and all persons interested had notice of such the defendant's withdrawal from and cancellation of said bond or instrument, and the same was not received or believed by said clerk to be the defendant's bond or agreement, and he was not in any degree influenced in or to the approval thereof by reason of the defendant's signature remaining on the same, as aforesaid. At that time there was not, nor was there for more than one year thereafter, any rule or order of the said circuit court adopting as a rule of precedure therein or giving any force or effect to the laws of the State of Nebraska then in force regulating the issuing of executions or the proceedings to be had therein to enforce the collection of judgments in the said court.

And defendant denies that the said clerk so recorded the said bond or instrument or made such entries in the judgment docket, or did any such act or acts as to make the said bond a judgment against the signers thereof or a lien upon their real property in this district.

3. He denies that said so-called judgment remained in force or had any force or effect whatever when the said execution mentioned in paragraph 3 of the petition was issued or at any time, and denies that the proceedings of the marshal under or in pursuance of the same, as alleged, were due proceedings or had any force or effect, and denies that either the order of this court purporting to confirm said sale or the alleged conveyance of said Ellis L. Bierbower to said Ewing had any force or effect, and denies that said Ewing thereby or otherwise became seized in fee of the said premises or entitled to the possession thereof, and denies that said Ewing ever had any title, estate, right, or interest in or to said premises or any part thereof. And he says that all the proceedings mentioned in the peti-
12 tion touching the filing or approval of said bond or the issuing of execution, or of the levy on or sale of said real property or the confirming thereof or the execution of a deed thereof, were without jurisdiction and void.

4. He denies that said plaintiff has any title, estate, right, or interest to or in the said premises or any part thereof, and denies that he is entitled to the possession thereof or of any part thereof, and denies that he, the defendant, unlawfully keeps said plaintiff out of possession of said premises.

Further answering, and for his second defense, the defendant says that at the time of the conveyance from said Thomas Ewing to the plaintiff, alleged in the petition, there was pending in the district

court for Lancaster county, in the State of Nebraska, in which county the real property and premises in controversy were situated, an action between this defendant as plaintiff and the said Thomas Ewing as defendant, for the same cause as is this action, in which action so as aforesaid pending this defendant pleaded and alleged the title in fee-simple in and to the said premises to be in him, and demanded that it be so adjudged, and that the said conveyance from Ellis L. Bierbower to said Ewing herein set up and pleaded by the plaintiff be adjudged to be null and void, and in which action so then pending the said Ewing, having been duly served with summons, appeared, and by his answer set up and pleaded all the said proceedings touching bond, judgment entries, execution, levy, sale, confirmation, and deed, as are by the plaintiff herein set forth in his petition, and in which answer, by way of any counter-claim, the said Ewing prayed judgment that because of such proceedings and conveyances the plaintiff in said action, to wit, this defendant, be decreed to surrender and deliver possession of the said premises to the said Ewing
13&14 and admit said Ewing to the possession thereof, and also prayed that said action be dismissed, and for all other relief that was necessary and equitable.

The said action is still pending and undetermined in the said court upon the issues and for the relief aforesaid, and when the plaintiff herein received the conveyance from said Ewing he had both constructive and actual knowledge of the pendency thereof.

E. WAKELEY, MASON AND WHEDON,
Att'ys for Defendant.

STATE OF NEBRASKA, } ss:
Douglas County, }

Milton F. Lamaster, the defendant, being duly sworn, says that he believes the foregoing plea and the facts stated therein and in the foregoing answer to be true.

MILTON F. LAMASTER.

Sworn to before me and signed in my presence this 24th day of November, A. D. 1882.

ELMER D. FRANK, *Clerk*,
By A. L. FRANK, *Deputy*.

Upon the back of said plea and answer appear endorsements in words and figures following, to wit: No. 245—F. U. S. circuit court, district of Nebraska. Jno. W. Keeler *vs.* M. F. Lamaster. Plea and answer. Filed Nov. 24, 1882. Elmer D. Frank, clerk. E. Wakeley, Mason & Whedon, for def't.

15 Thereupon, afterwards, at the January term of said court, on the 1st day of February, 1883, the following proceedings were had as appears of record on folio 408, Journal H of said court, to wit:

Trial.

JOHN W. KEELER
vs.
MILTON F. LAMASTERS. } No. 245—F.

Now come the parties herein, by their attorneys; also came the following-named persons as jurors, to wit: 1, Geo. A. Abbott; 2, C. M. Doughton; 3, J. P. Miller; 4, S. P. Benadum; 5, J. S. Bennett; 6, D. C. Work; 7, J. F. Merritt; 8, W. F. Wright; 9, John Dennison; 10, J. L. Huber; 11, W. E. Majors; 12, Solomon Ramsey, who were duly empaneled and sworn according to law, and thereupon to support his plea in abatement the defendant offered to read in evidence the deposition of the plaintiff, John W. Keeler, heretofore taken and filed in this cause, to which the plaintiff objected, on the ground that the jurisdiction of this court does not rest upon the citizenship of the parties; but the action arises under the laws of the United States, and thereupon, the court being of opinion that this action arises under the laws of the United States, it is ordered that the said plea in abatement be, and the same is hereby, overruled, and thereupon the jury rendered a verdict in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

JOHN W. KEELER, Plaintiff, *vs.* MILTON F. LAMASTER, Defendant.

We, the jury empaneled in this action, find for the defend-
16 ant.

WILSON E. MAJORS, *Foreman.*

Thereupon it is ordered by the court that judgment be, and the same is hereby, entered for defendant upon said verdict.

Thereupon the plaintiff moved the court to set aside said judgment and verdict under the statute, and it is ordered that the said judgment and verdict be, and the same are, set aside, and the cause continued to the next term; and it is ordered that the defendant have leave to amend his answer, if so advised, alleging that the deed alleged by the plaintiff is not the real party in interest.

Thereupon afterwards, to wit, on the 1st day of March, 1883, amended answer was filed in said case, which said amended answer is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

JOHN W. KEELER, Plaintiff, *vs.* MILTON F. LAMASTER, Defendant.

Now comes the defendant and for amended answer to the petition herein states as follows:

1. That the said alleged conveyance of the real estate in controversy from said Thomas Ewing to said plaintiff was a mere colorable and collusive conveyance, made only for the purpose of enabling

the plaintiff to commence and maintain an action in this court for the recovery of the real estate, and the rents and profits thereof, and to enable this court to take jurisdiction thereof. That at the time of said alleged conveyance the said Thomas Ewing and this defendant both were, and both still are, citizens and residents of the State of Nebraska, all which facts, hereinbefore alleged, were at the time thereof well known to said plaintiff, and he and the said Thomas Ewing, so as aforesaid, colluded together for the pur-
17 pose aforesaid; that said plaintiff has not nor does he claim to have any title to or interest in said real estate, or in said rents and profits, except such, if any, as he derived by virtue of the said deed of conveyance.

That the said Thomas Ewing is the real party in interest in this action, which is commenced and prosecuted by him and for his use and benefit in the name of the plaintiff.

That said alleged conveyance was and is a fraud upon the jurisdiction of this court, and this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court; and the said plaintiff has been improperly and collusively made a party for the purpose of creating a case cognizable under the act of Congress relating to the jurisdiction of this court.

2. He denies that the said instrument, purporting to be and which is alleged in the petition to have been a bond, was the bond, contract, or agreement of this defendant, although his signature was affixed and subscribed thereto. And he says that he signed said instrument, and signed and verified a justification thereon as a surety thereto, while the same was in the hands, possession, and control of one John Irwin, as the agent of said William P. Young, and long before the same had been presented to or seen by the clerk of said court in which said judgment was rendered, but did so upon the express condition that before the same should be filed or used, or presented to the clerk as a stay bond, two certain persons, other than those who at any time signed or executed the same, should also sign and execute the same, and made justification thereto, but neither thereof ever did sign or execute the same.

That afterwards the said condition not having been complied with, and said instrument still remaining in the hands, possession, and control of said Irwin, as aforesaid, and not having been
18 presented to or seen by said clerk, the defendant went to said Irwin and required that his name be erased from the said instrument, and notified said Irwin as such agent that he, the said defendant, altogether withdrew from the said bond, and that he would not be a surety thereon, and revoked any and all authority which he had before then given to said Irwin, or to said Young, or to any person to present the said instrument to the said clerk, or to make use of the same in any manner whatever, as this defendant's bond, contract, or agreement; and thereupon it was expressly agreed between this defendant and said Irwin, as such agent as aforesaid, that the same should not be so presented or so used; and thereupon for the purpose and with the intent of preventing any such presentation or use of the same, the defendant took said instrument, intend-

ing to erase therefrom his signature so affixed thereto, but by inadvertence and oversight, instead of erasing such signature so affixed to the body of said instrument, he erased his signature which was affixed to his affidavit of justification appended to said instrument, believing and intending such erasure to be the erasure and cancellation of his signature to said bond or instrument, being at the time forgetful of, or inattentive to, the fact that his signature was to both the bond and the affidavit; and in that condition said bond or instrument was presented to and filed by the clerk aforesaid. And the defendant says that he, the said clerk, and the plaintiffs in said judgment, and all persons interested, had notice of such the defendant's withdrawal from and cancellation of said bond or instrument, and the same was not received or believed by said clerk to be the defendant's bond or agreement; and he was not in any degree influenced in or to the approval thereof by reason of the defendant's signature remaining on the same as aforesaid. At that time there was not nor was there for more than one year thereafter any rule or order of the said circuit court adopting as a rule of pro-
19 cedure therein or giving any force or effect to the laws of the State of Nebraska then in force regulating the issuing of executions or the proceedings to be had therein to enforce the collection of judgments in the said court.

And defendant denies that the said clerk so recorded the said bond or instrument, or made such entries in the judgment docket, or did any such act or acts as to make the said bond a judgment against the signers thereof, or a lien upon their real property in this district.

3. He denies that said so-called judgment remained in force or had any force or effect whatever when the said execution mentioned in paragraph 3 of the petition was signed, or at any time, and denies that the proceedings of the marshal under or in pursuance of the same, as alleged, were due proceedings or had any force or effect.

And denies that the said defendant alleged in his motion to set said sale aside, as one of the reasons therefor, that there was no law or rule of the said court authorizing the issuing of said execution against him, or that the court, upon consideration of the objections urged by this defendant against the confirmation of said sale, determined and held that the statute of this State had been adopted into the practice of this court, or that the said court considered upon said motion the affidavits filed by the said defendant in support thereof; but, on the contrary, the same were, on motion, stricken from the files by said court, and not heard or considered thereon, and the said court refused to hear and consider any of the matters set forth in said affidavits on the hearing of said motion. And the said defendant further denies that the said court considered or was required to consider and determine on said motion any matters excepting such as related to the proceedings taken and had
20 by said marshal under said pretended execution, and the said defendant further denies that either the order of this court, purporting to confirm said sale, or the alleged conveyance of said Ellis L. Bierbower to said Ewing had any force

or effect, and denies that said Ewing thereby or otherwise became seized in fee of the said premises, or entitled to the possession thereof, and denies that said Ewing ever had any title, estate, right, or interest in or to said premises, or any part thereof. And he says that all the proceedings mentioned in the petition, touching the filing or approval of said bond, or the issuing of execution, or the levy on or sale of said real property, or the confirmation thereof, or the execution of a deed therefor, were without jurisdiction and void.

4. He denies that said plaintiff has any title, estate, right, or interest to or in the said premises, or any part thereof, and denies that he is entitled to the possession thereof, or any part thereof, and denies that he, the defendant, unlawfully keeps said plaintiff out of possession of said premises.

Further answering, and for his second defense, the defendant says that, at the time of the conveyance from said Thomas Ewing to the plaintiff alleged in the petition, there was pending in the district court for Lancaster county, in the State of Nebraska, in which county the real property and premises in controversy were situated, an action between this defendant, as plaintiff, and the said Thomas Ewing, as defendant, for the same cause as is this action, in which action so as aforesaid pending this defendant pleaded and alleged the title in fee simple in and to the said premises to be in him, and demanded that it be so adjudged, and that the said conveyance from Ellis L. Bierbower to said Ewing herein set up and pleaded by the plaintiff be adjudged to be null and void, and in which action so then pending the said Ewing, having been duly served with
21 summons, appeared, and by his answer set up and pleaded, all the said proceedings touching said bond, judgment entries, execution, levy, sale, confirmation, and deed as are by the plaintiff herein set forth in his petition, and in which answer, by way of counter-claim, the said Ewing prayed judgment that because of such proceedings and conveyance the plaintiff in said action, to wit, this defendant, be decreed to surrender and deliver possession of the said premises to the said Ewing, and admit said Ewing to the possession thereof, and also prayed that said action be dismissed, and for all other relief that was necessary and equitable.

The said action is still pending and undetermined in the said court upon the issues and for the relief aforesaid, and when the plaintiff herein received the conveyance from said Ewing he had both constructive and actual knowledge of the pendency thereof.

MASON AND WHEDON,
E. WAKELEY,
Att'ys for Defendant.

STATE OF NEBRASKA, }
Douglas County, } *ss:*

Milton F. Lamaster, the defendant above named, being duly sworn, says that he believes the facts stated in the foregoing answer to be true.

MILTON F. LAMASTER.

Sworn to before me and signed in my presence this 1st day of March, 1883.

[SEAL.] ARTHUR C. WAKELEY,
Notary Public.

Upon the back of said amended answer appear endorsements in words and figures following, to wit: No. 245—F. U. S. circuit court, district of Nebraska. John W. Keeler *vs.* M. F. Lamaster. Amended answer filed Mar. 1, 1883. Elmer D. Frank, clerk, by A. L. Frank, deputy. Refiled Dec. 3, 1883. Elmer D. Frank, clerk. Mason & Whedon, E. Wakeley, for defendant.

22 Thereupon afterwards, to wit, on the 4th day of December, 1883, a reply was filed in said case, which said reply is in words and figures following, to wit:

Reply.

In the United States Circuit Court, District of Nebraska.

JOHN W. KEELER *vs.* MILTON F. LAMASTERS.

Now comes the said plaintiff, and for reply says:

I. He denies each and every allegation in the several defenses pleaded in said answer, except he admits that the said Ewing and defendant were at the time in that behalf in said answer alleged and still are citizens of this State, and that this plaintiff has not nor does claim title to said premises, real estate, or rents or profits except such as he derived by virtue of the deed in the pleadings mentioned from said Ewing to him. And this plaintiff reaffirms all and every the matters and things by him in his amended petition herein alleged, — prays judgment as he has already prayed.

J. M. WOOLWORTH AND
HULL & STEARNS,
Pl'ff's Att'ys.

DISTRICT OF NEBRASKA, *ss:*

R. D. Stearns, being duly sworn, says: He is one of the attorneys for the plaintiff in the above-entitled action; that the facts stated in the foregoing reply are true, as he verily believes.

R. D. STEARNS.

Subscribed in my presence and sworn to before me, this 4th day of December, 1883.

ELMER D. FRANK, *Clerk.*

Upon the back of said reply appear endorsements in words and figures following, to wit: No. 245—F. U. S. circuit court, district of Nebraska. Jno. W. Keeler *vs.* Milton F. Lamaster. Reply. Filed Dec. 4, 1883. Elmer D. Frank, clerk.

23 Thereupon afterwards, at the November term of said court, on the 10th, 11th, 12th, and 13th days of December, 1883, the following proceedings were had, as appears of record on folios 51, 53, 54, & 56, Journal I, of said court, to wit:

Trial.

JOHN W. KEELER
vs.
MILTON F. LAMASTERS. } No. 245—F.

Now come the parties herein, by their attorneys; also come the following-named persons as jurors, to wit: 1, C. F. Walther; 2, William Mast; 3, James Fullen; 4, John Dennison; 5, I. C. Jones; 6, William Rider; 7, A. M. Holmes; 8, C. J. Harning; 9, William Parchen; 10, H. D. Merrill; 11, H. D. Calland; and, 12, H. N. Libby, who were duly empaneled and sworn according to law; and the said jury having heard the testimony adduced in part, said cause was continued until to-morrow morning, at 10 o'clock.

Trial Continued.

JOHN W. KEELER
vs.
MILTON F. LAMASTERS. } No. 245—F.

On this day again come the parties hereto, by their attorneys; also come the jury, empaneled and sworn herein. Said jury heard further testimony; and the time having arrived for the adjournment of the court and the trial of this cause not being finished, said jury was allowed to separate until the coming in of court to-morrow morning, after being duly instructed as to their duties by the court.

Cause Submitted to Jury.

JOHN W. KEELER
vs.
MILTON F. LAMASTERS. } No. 245—F.

On this day again come the parties herein, by their attorneys; also come the jury empaneled and sworn herein; and thereupon,
24 after hearing the remaining evidence, the argument of counsel, and charge of the court, the jury retire to their room in charge of a bailiff, duly sworn, for deliberation.

JOHN W. KEELER
vs.
MILTON F. LAMASTER. } 245—F.

On this day again come the parties herein by their attorneys; also come the jury empaneled and sworn herein into open court and present to the court their verdict in words and figures following, to wit:

Verdict.

JOHN W. KEELER
vs.
MILTON F. LAMASTER. } No. 245—F.

We, the jury, find that the conveyance of the lot in controversy

from Thomas Ewing to the plaintiff was merely colorable and collusive, and was made for the purpose of creating a case cognizable in this court under the acts of Congress of the United States.

We find that the plaintiff is not the real party in interest in this action, and that the action is being prosecuted for the use and benefit of the said Thomas Ewing, and that Keeler is only a nominal and colorable party.

H. D. MERRILL.
I. C. JONES.
A. M. HOLMES.
C. F. WALTHER.
WM. RIDER.
H. N. LIBBY.
WM. MAST.
JAMES FULLEN.
C. J. HORNING.
WM. PARCHEN.
H. D. CALLAND.
JOHN DENNISON,
Foreman.

Thereupon, afterwards, to wit, on the 13th day of December, 1883, a motion to set aside special verdict was filed in said case, which said motion is in words and figures following, to wit:

In the U. S. Circuit Court in and for the State of Nebraska.

JOHN W. KEELER, Plaintiff, *vs.* MILTON F. LAMASTER, Defendant.

25 Comes now the plaintiff in the above-entitled cause and moves the court to set aside the verdict of the jury in said cause for the reason that the same does not determine the issues made by the pleadings, and is contrary to the law and the evidence, and is contrary to and in defiance of the instructions of the court given in said cause.

J. M. WOOLWORTH AND
HULL & STEARNS,
Pl'ff's Attorneys.

Upon the back of said motion appear endorsements in words and figures following, to wit: No. 245—F. Jno. W. Keeler *vs.* Milton F. Lamaster. Motion to set aside special verdict. Filed Dec. 13, 1883. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, on the 13th day of December, 1883, a motion for judgment was filed in said case, which said motion for judgment is in words and figures following, to wit:

In the U. S. Circuit Court in and for the State of Nebraska.

JOHN W. KEELER, Pl'ff, *vs.* MILTON F. LAMASTER, Def't.

Comes now the plaintiff in the above-entitled cause and moves the

court to render judgment in favor of plaintiff, notwithstanding the verdict of the jury rendered this day.

J. M. WOOLWORTH &
HULL & STEARNS,
Pl'ff's Att'ys.

Upon the back of said motion appear endorsements in words and figures following, to wit: No 245—F. Jno. W. Keeler *vs.* Milton F. Lamaster. Motion for judgment. Filed Dec. 13th, 1883. Elmer D. Frank, clerk.

Thereupon, afterwards, at the January term of said court, on the 3rd day of January, 1884, the following proceedings were had, as appears of record on folio 95, Journal I, of said court, to wit:

26 *Order Setting Aside Findings & Verdict.*

JOHN W. KEELER *vs.* MILTON F. LAMASTER.

This cause this day coming on to be heard on the motion of the plaintiff to set aside the finding and verdict of the jury heretofore rendered herein was argued and submitted by the court by attorneys for respective parties hereto. Whereupon, after careful consideration thereof, and being fully advised in the premises, the court doth now on this day sustain said motion, and it is adjudged by the court that the finding and verdict herein be, and the same hereby is, set aside, to which ruling and order said defendant, by his attorney, excepts.

Thereupon, afterwards, at the January term of said court, on the 28th & 29th days of January, 1884, the following proceedings were had, as appears of record on folios 197, 200, Journal I, of said court, to wit:

Trial.

JOHN W. KEELER
vs.
MILTON F. LAMASTER. } No. 245—F.

Now come the parties herein by their attorneys; also come the following named persons as jurors, to wit: 1, E. M. Stockton; 2, O. M. Humphrey; 3, C. D. Martin; 4, John Scribbins; 5, T. J. Mason; 6, James Connell; 7, W. W. Kendall; 8, David T. Phillips; 9, C. M. Pike; 10, Alfred Breuner; 11, W. W. Carter, 12; L. W. Miller, who were duly empaneled and sworn according to law, and the said jury having heard the testimony adduced in part, and the time having arrived for the adjournment of the court, and the trial of this cause not being finished, the jury was allowed to separate until the coming in of court to-morrow morning, after being duly instructed as to their duties by the court.

27 *Trial Continued.*

JOHN W. KEELER
vs.
MILTON F. LAMASTER. } No. 245—F.

On this day again come the parties hereto, by their attorneys; also come the jury empaneled and sworn herein. Said jury heard further evidence, and the time having arrived for the adjournment of the court, and the trial of this cause not being finished, the jury was allowed to separate until the coming in of court to-morrow morning, after being duly instructed as to their duties by the court.

JOHN W. KEELER
vs.
MILTON F. LAMASTER. } No. 245—F.

On motion of the plaintiff by Woolworth, Hull and Stearns, his attorneys, leave is granted him by the court to dismiss claim for rents and profits of the premises described in the petition herein.

And it is further ordered by the court that the affidavit of Milton F. Lamaster filed in this cause be, and the same hereby is, stricken from the files.

Thereupon, afterwards, to wit, on the 30th day of January, 1884, request that charge to jury be reduced to writing was filed in said case, which said request is in words and figures following, to wit:

United States Circuit Court.

JOHN W. KEELER
vs.
MILTON F. LAMASTER. } 245—F.

Now comes the said defendant, by his attorney, and requests the court to reduce the charge to the jury to writing before the same is given to the jury in this case.

GEO. W. DOANE,
Att'y for Def't.

28 Upon the back of said request appear endorsements in words and figures following, to wit: No. 245—F. John W. Keeler *v.* Milton F. Lamaster. Request that charge to jury be reduced to writing. Filed Jan. 30, 1884. Elmer D. Frank, clerk.

Thereupon, afterwards, at the January term of said court, on the 30th day of January, 1884, the following proceedings were had, as appears of record on folio 202, journal I, of said court, to wit:

Cause Submitted to Jury.

JOHN W. KELLER *vs.* MILTON F. LAMASTER.

On this day again come the parties hereto by their attorneys; also come the jury empaneled and sworn herein. And thereupon, after hearing the remaining evidence, the argument of counsel, and

charge of the court, said jury retire to their room in charge of a bailiff, duly sworn for deliberation.

Thereupon, afterwards, at the January term of said court, on the 1st day of February, 1884, the following proceedings were had, as appears of record on folio 213, journal I, of said court, to wit:

JOHN W. KEELER
vs.
MILTON F. LAMASTER. } No. 245—F.

Now, on this day, again come the parties hereto, by their attorneys; also come the jury herein into open court and present to the court their verdict, which said verdict is in the words and figures following, to wit:

General Verdict.

In the Circuit Court of the United States, District of Nebraska.

J. W. KEELER *vs.* MILTON F. LAMASTER.

29 We, the jury empaneled and sworn in this case, do find for the plaintiff that he is entitled to the possession of the premises in the pleadings mentioned, (to wit,) lot nine (9), block fifty-six (56), in the city of Lincoln, Lancaster county, State of Nebraska, and the defendant unlawfully withholds the same.

1*st Special Finding.*

We, the jury, do further especially find that this action did not arise under the laws of the United States referring to executions.

2*nd Special Finding.*

We, the jury, do further especially find plaintiff, J. W. Keeler, and Thomas Ewing did not enter into any agreement or understanding whereby said plaintiff agreed to reconvey to said Ewing the said premises, or hold the same for him.

(Signed) C. D. MARTIN, *Foreman.*

Thereupon, afterwards, to wit, on the 1st day of February, 1884, a motion for a new trial was filed in said case, which said motion for new trial is in words and figures following, to wit:

Motion for New Trial.

United States Circuit Court, District of Nebraska.

JOHN W. KEELER *vs.* MILTON F. LAMASTER.

The said Milton F. Lamaster, defendant, now comes, by Geo. W. Doane, his attorney, and moves the court to set aside the verdict of the jury and to award a new trial herein for the following reasons, to wit:

I. For irregularity in the proceedings of the court and abuse of

discretion, whereby the said defendant was prevented from having a fair trial.

30 II. That the verdict is against the weight of evidence and is contrary to law.

III. For errors of law occurring at the trial and excepted to by the said defendant at the time.

GEO. W. DOANE,
Att'y for Def't.

Upon the back of said motion for new trial appear endorsements in words and figures following, to wit: No. 245—F. John W. Keeler *vs.* M. F. Lamaster. Motion for a new trial. Filed Feb. 1, 1884. Elmer D. Frank, clerk. G. W. D.

Thereupon afterwards, at the January term of said court, on the 20th day of February, 1884, the following proceedings were had, as appears of record on folio —, Journal I, of said court, to wit:

Motion for New Trial Overruled and Judgment.

JOHN W. KEELER
vs.
MILTON F. LAMASTER. } No. 245—F.

This cause coming on for hearing on the motion of the defendant herein to set aside the verdict and for a new trial herein, and the court, on consideration thereof, and being fully advised in the premises, doth now on this day overrule the same.

It is therefore ordered and adjudged by the court that the said plaintiff, John W. Keeler, is the owner of and entitled to the immediate possession of the premises described in the petition, to wit, lot nine (9), in block fifty-six (56), in the city of Lincoln, county of Lancaster, and State of Nebraska, and that said plaintiff have and recover of and from the said defendant the said premises, together with costs herein, taxed at $——.

To which judgment and ruling of the court the defendant, by his attorneys, then and there excepted. Exceptions are to be prepared and filed in 20 days, as per stipulation on file.

31 And thereupon, on application of the said defendant, it is further ordered that a bond to supersede the execution of the judgment rendered herein be given in the sum of twenty-five hundred dollars, conditioned according to law, with good and sufficient security.

Thereupon afterwards, to wit, on the 14th day of April, 1884, bill of exception was filed in said case, which said bill of exceptions is in words and figures following, to wit:

Bill of Exceptions.

United States Circuit Court, District of Nebraska.

JOHN W. KEELER *vs.* MILTON F. LAMASTER.

Be it remembered that on the trial of this case in the circuit court of the United States for the district of Nebraska, at the January term thereof, A. D. 1884, the said plaintiff, to maintain the issue on his part, introduced in evidence the entry of a judgment rendered at the November term of said court, to wit, on the 12th day of November, A. D. 1875, in favor of Charles W. Seymour and William W. Wardell, as plaintiffs, against William P. Young, defendant, for the sum of $6,500.00 debt, and $815.97 costs, which judgment is recorded in page 388 of Journal "C" of the records of said court.

To the introduction of which the said defendant, by his attorney, then and there objected as immaterial, irrelevant, and incompetent, which objection was overruled by the court; to which ruling the said defendant, by his attorney, then and there duly excepted.

And to further maintain the issue on his part the said plaintiff introduced in evidence the record of the stay bond given to stay execution upon said judgment against said Young and Young, which said record is found on page four of stay bond record "A" of said court.

To the introduction of which record the said defendant objected as immaterial and incompetent, which objection was over-
32 ruled by the court; to which ruling the said defendant, by his attorney, then and there duly excepted.

And to further maintain the issue on his part the said plaintiff introduced in evidence the entry on the judgment index of said court found on line six under letter "L," as follows: Defendants, Lamaster, M. F., *et al.* (surety); plaintiffs, Seymour & Wardell. Appearance docket book C, No. 138. Date of judgment, Nov. 12, 1875. Amount of judgment, 6,500.00.

To the introduction of which the said defendant, by his attorney, objected as immaterial and incompetent; which objection was overruled by the court, to which ruling the said defendant, by his attorney, then and there duly excepted.

And to further maintain the issue on his part the said plaintiff introduced in evidence the fifth *alias* execution issued upon said judgment of Seymour *et al. vs.* Young *et al.*, which execution was dated April 14, 1881, together with the appraisement, notice of sale, and return of marshal thereon.

To which the said defendant, by his attorney, objected as immaterial and incompetent; which objection was overruled by the court, to which ruling the said defendant, by his attorney, then and there duly excepted.

A copy of said execution, appraisement, notice, and return is hereto attached, marked "A."

And to further maintain the issue on his part the said plaintiff introduced in evidence a motion to set aside the sale made under said *alias* execution, which motion of defendant Lamaster was filed on May 27th, 1881, in said case of Seymour *et al. vs.* Young *et al.*

To the introduction of which the said defendant, by his attorney, objected as immaterial and incompetent; which objection was overruled by the court, to which ruling the said defendant, by his attorney, then and there duly excepted.

A copy of said motion is hereto attached, marked "B."

33 And to further maintain the issue on his part the said plaintiff introduced in evidence an order of said court made on the 13th day of May, 1881, and entered in Journal "G" of the records of said court, on page 88.

To the introduction of which the said defendant, by his attorney, objected as immaterial and incompetent; which objection was overruled by the court, to which ruling the said defendant, by his attorney, then and there duly excepted.

A copy of said order is hereto attached, marked "C."

And to further maintain the issue on his part the said plaintiff introduced in evidence the order of confirmation of said sale made on the — day of September, 1881, and recorded in Journal "G" of the records of said court, on page 213.

To the introduction of which the said defendant, by his attorney, objected as immaterial and incompetent; which objection was overruled by the court, to which ruling the said defendant, by his attorney, then and there duly excepted.

A copy of said order is hereto attached, marked "D."

And to further maintain the issue on his part the said plaintiff introduced in evidence the bill of exceptions on said order of confirmation filed in said cause of Seymour *et al. vs.* Young *et al.* on the 21st day of January, 1882.

To the introduction of which the said defendant, by his attorney, objected as immaterial and incompetent; which objection was overruled by the court, to which ruling the said defendant, by his attorney, then and there duly excepted.

A copy of said bill of exceptions is hereto attached, marked "E."

And to further maintain the issue on his part the said plaintiff offered as a witness J. M. WOOLWORTH, who, being sworn, testified as follows:

34 I am a lawyer, and have been and am one of the counsel for plaintiff in this case, and as such had the custody of the deed to Ewing from the marshal of lot 9, block 56, in the city of Lincoln. I cannot tell when I last saw the deed, but it was after this suit was brought. I cannot state where it is now. I had it in my office at one time, but have no distinct recollection of what became of it. I have made search, and am unable to find it. So far as I am concerned, it is lost.

On cross-examination said witness testified:

I think I saw the deed shortly after this suit was brought; I had it then; have no distinct recollection where I put it; generally keep such papers in my safe; do not remember whether I put this deed in my safe; my impression is I gave it to Mr. Hull; I have no knowledge of its being lost; I know that I have not got it; that is as far as I could say; I can only say that at one time after this suit was brought I had it in my possession, and I think I gave it to Hull, and have not seen it since.

And to further maintain the issue on his part the said plaintiff offered as a witness D. G. HULL, who, being sworn, testified as follows:

I remember of having the deed referred to by Mr. Woolworth with him in his office, but have never been able to find it since. The last time I recollect of seeing it was in his office during a conversation in regard to this case. I do not remember of taking it; I have made diligent search for it among my papers, but have been unable to find it; have not given it to anybody that I know of, and do not know where it is; I had a strong impression that Mr. Woolworth had it.

On cross-examination the witness testified:

The last I saw of the deed was in Mr. Woolworth's office; have no recollection of ever seeing it since the occasion referred to. It was in Mr. Woolworth's possession the last time I saw it; I do not remember of giving it to Mr. Ewing; all I can say about it is, I do not know where it is, and I am unable to find it; and thereupon the said plaintiff offered in evidence a certified copy of said deed.

To which the said defendant, by his attorney, objected as immaterial, incompetent, and secondary evidence, and no sufficient foundation having been laid for the introduction thereof, which objection was overruled by the court, and the said copy admitted in evidence, to which said ruling the said defendant, by his attorney, then and there duly excepted.

The said copy is hereto attached, marked "F."

And to further maintain the issue on his part the said plaintiff recalls J. M. WOOLWORTH, who testifies as follows:

I have seen the deed from Ewing to Keeler for lot 9, block 56, in the city of Lincoln. We had it at the other trial and offered it in evidence there. I do not know where it is now. When I last saw it it was on the table in the court-room at the last term of court in Omaha. I have not made search for it. I have nothing to search. I have gone over papers in this case, among which it would probably be if I had it, but I could not find it. If it had been among them it would have arrested my attention.

And on cross-examination the witness testified as follows:

I did not take charge of the deed at the time of the former trial, and have not seen it since. The former trial was in December last. The deed was produced there by Mr. Stearns to be read in evidence, and was in our possession then. I do not think it was lost, only what I have stated about it; only know that we had it at the last term of court, and I have not seen it since.

And, to further maintain the issue on his part, the said plaintiff offered as a witness R. D. STEARNS, who, being sworn, testified as follows:

I am a lawyer and one of the counsel in this case, and as such had possession of the deed from Ewing to Keeler; the last time I saw it was at Omaha during the former trial of this case, and, as near as I can
36 recollect, two days before the close of the trial. I think I saw it immediately after it was read in evidence. It is not now in my possession. I have not seen it since the other trial, and do not know where it is. Mr. Keeler was not present at that trial, and has not been in Nebraska to my knowledge since that time. I made search before the adjournment of court yesterday very thoroughly for the deed, but was unable to find it. I procured this copy from the clerk's office.

And on cross-examination the said witness testified as follows:

I did not present this certified copy as being the original deed in evidence on yesterday. I presented it, but made no remarks about it. Did not say at the time that it was the deed that was read at the other trial. I do not remember how long I had possession of the deed. I got it before the other trial from Keeler; had him forward it to me. He had possession of it from the time it was recorded until shortly before the trial. I saw it on the table after it was presented in evidence at the former trial, and do not know what was done with it, and have not seen it since. That is all I know about it. I do not remember whether I got the deed from the recorder's office after it was recorded, or whether it was sent to Mr. Keeler by the recorder. I may have got it from the recorder's office. I got it from Keeler very shortly before the trial at the last term.

And to further maintain the issue on his part the said plaintiff recalled as a witness on his behalf D. G. HULL, who testified as follows:

I do not know where the deed from Ewing to Keeler is. The last I recollect of seeing it was when I read it to the jury on the other trial, and do not think I have ever seen it since. I have made no particular search for it. I supposed this copy was the deed, the original, when I took it from the hand of Mr. Stearns; supposed it was the same deed I read to the jury at the other trial.

37 And on cross-examination the witness testified as follows:

All I know and can say about it is that the deed was introduced

in evidence at the last term, and was with the other documentary evidence in the case, and I have not seen it since.

And further to maintain the issue on his part the said plaintiff presented as a witness A. L. FRANK, who, being sworn, testified as follows:

I am assistant clerk of the United States circuit court, and have been somewhat in charge of the files and records of this court since December last. I made search this morning through the files of this court for the deed from Ewing to Keeler for lot 9, block 56, in the city of Lincoln, and did not find it.

And on cross-examination said witness testified:

I have never seen the deed to my knowledge. I have not made search in Omaha for it. It has not never been among the papers of this case, and was never in my possession to my knowledge. It may have been in the hands of the clerk, but not in mine.

And thereupon the said plaintiff offered in evidence said certified copy of said deed from Ewing to Keelar, dated July 17th, 1882.

To the introduction of which the said defendant, by his attorney objected as immaterial and incompetent, no sufficient foundation having been laid for the introduction of secondary evidence, which objection was overruled by the court, and the said copy of said deed was admitted in evidence. To which ruling the said defendant, by his attorney, then and there duly excepted. A copy of said deed is hereto attached, marked "G."

And thereupon the said plaintiff rested, no other or further testimony having been presented by him.

And thereupon the said defendant to maintain the issue on his part offered as a witness A. L. FRANK, who, having been sworn, testified as follows:

I am assistant clerk of this court, and as such have charge of the records. I have here Journal "C" of the record of this court, and on page 733 I find the order of the court adopting the provisions of the State law relating to proceedings under execution. I have examined
38 the records and find that this order entered on the journal under date of December 30th, 1876, is the first order made by the court adopting the State practice relating to proceedings under execution after February 23rd, 1875.

And to further maintain the issue upon his part the said defendant offered in evidence and read to the jury the said order of December 30th, 1876, a copy of which order is hereto attached, marked "H."

And to further maintain the issue on his part the said defendant offered in evidence and read to the jury the original stay bond, signed by the said defendant with others, with the affidavits thereto attached. A copy of said stay bond, with the said affidavits attached thereto, is hereto attached, marked "I."

And to further maintain the issue on his part the said defendant presented himself as a witness on his own behalf, who, being sworn, testified as follows:

I am the defendant. I signed the stay bond which has been introduced in evidence. Mr. John Irwin presented it to me and requested me to sign it. At first I refused; but he importuned me very strongly to sign it, and told me that two other men in Nebraska City, whose names he mentioned, and whom I knew were responsible men, were going to sign it besides those whose names were already on the bond, and that he would procure their signatures to the bond before it should be presented to the clerk. One of the men whose names he mentioned as intending to sign the bond was Tate; the other I cannot now recall, but it was a man I knew as a responsible man. I thereupon signed the bond, relying upon his promise to get the other signatures. This was in the forenoon, and in the afternoon I made the affidavit of justification as to my property. In the evening I saw my brother, Joseph E., and told him I had signed
39 the bond, but thought I had done a foolish thing, and had concluded to take my name off. He said if I would go then to Mr. Irwin's and take it off he would go with me. We went over to Irwin's and asked him to let me see the bond. He brought it to me, and as soon as I got it in my hand I told him I would take my name off the bond; that it was an injustice to myself to leave it there, and that my name could not remain on the bond. The old man asked me not to destroy the bond, and gave me a pair of scissors and I cut my name off. This was about nine o'clock in the evening and I could not see good. I stepped up to the candle and could just manage to make out my name by the dim light. When I was certain it was my name I cut it off and folded it up and put it in my pocket. I thought I had cut my name off the body of the bond. The old man then took up the bond, and I did not have it in my possession again. I never learned that my name was claimed to be on the bond after that until my property was advertised for sale, and then I went to Omaha to see about it.

The attorney for said defendant then propounded to the witness the following question:

"State what you know, if anything, in regard to any change having been made in the execution after your property was advertised for sale."

To which question the said plaintiff, by his attorney, objected as immaterial and incompetent.

The attorney for defendant thereupon stated to the court that he offered to prove by this witness that after his property was advertised for sale under the execution which is in evidence he went to Omaha and applied to the then clerk of this court, W. B. Smith, now deceased, to learn by what authority his property was advertised for sale, and then learned that an execution was in the hands of the marshal; that the execution had been issued for the sum of $889.59, which was stated by the clerk as being the balance due on the judg-

ment on April 2nd, 1881; that he, the defendant, was never
40 notified that any different sum was claimed, or that any change had been made in the execution until after his property had been sold thereunder and an application made for the confirmation of the sale.

To the introduction of which testimony the said plaintiff, by his attorney, objected, as immaterial and incompetent, which objection was sustained by the court, and the said testimony and the said question calling for the same was excluded, to which ruling the said defendant then and there duly excepted.

The witness further testified:

The property sold was worth in July, 1882, from $6,500.00 to $7,000; the tendency in value from May, 1881, to July, 1882, was upward. I was in possession of the property at the time it was sold under execution in May, 1881, and from that time to July 17th, 1882. I had a house on the lot which I had erected there myself.

On cross-examination the witness testified as follows:

I built the house in 1872, I think, or 1873; I sold the property at one time, but do not recollect the date, to C. W. Foster, of Iowa. I sold it with some other property and cannot say what I got for it; the other property was some lots in this city—Lincoln—and included all that I owned here at that time; I do not remember how much money I got; think I got five thousand dollars in cash and notes. Afterwards, Foster sold the property to my brother and I took notes and money from my brother, but do not remember how much money or how much in notes; it was a good while ago; think the notes which I got from my brother amounted to more than five thousand dollars. Afterwards I took the property back and returned the money and gave back the notes; do not recollect when this was. I am now Government storekeeper at Omaha, and keep the bonded account of the warehouse at Iler's distillery.

41 And to further maintain the issue on his part the said defendant produced as a witness JOSEPH E. LAMASTER, who, being sworn, testified as follows:

I reside in Johnson county, Nebraska; in 1875 I was residing in Otoe county, Nebraska, and was living in Nebraska City at the time the stay bond, introduced in evidence, was signed by my brother. On returning home one night I found my brother there and he told me in conversation that he had signed the bond and that the other men were to sign it after him. I told him I did not think they would do it; that he had better get his name off from the bond. We went over to Mr. Irwin's house that night and found he had gone to bed, but we got him up and my brother asked him for the bond. He got it and handed it to me and I passed it to my brother. My brother then told him that he declined to go on the bond, that he could not stand it, and wished to take his name off; some conversation took place between them, in which Irwin said that he could

get two other men, whose names he mentioned, to sign the bond with him. The names he mentioned were Samuel Tate and George W. Shoat, both of Nebraska City, whom I knew to be responsible men. Their names were mentioned several times in the course of the conversation, and were spoken of as being the men who Mr. Irwin had promised my brother should sign the bond with him. After a while my brother took a pair of scissors and cut from the bond a slip of paper with his name on.

The attorney for defendant then propounded to the witness the following question:

"State whether or not at any time subsequent to the occasion you testified to, you had any conversation with the clerk of the court, Mr. Watson B. Smith, who is now dead, in regard to the approval of the bond and the names that he considered in making the approval."

To which question the said plaintiff, by his attorney, objected as immaterial and incompetent; which objection was sus-
42 tained by the court; to which ruling the said defendant then and there duly excepted.

The said defendant, by his attorney, then offered to prove by the witness that he had a conversation with the clerk of the court, Mr. Smith, in regard to the approval of this bond, in which Mr. Smith informed the witness that he did not consider the name of the defendant, Milton F. Lamaster, in approving the bond; that he considered the bond good without his name, and that he noticed the fact that the justification of defendant had been removed from the bond.

To which offer the said plaintiff, by his attorney, objected as being immaterial and incompetent; which objection was sustained by the court and the said testimony excluded, to which ruling the said defendant, by his attorney, then and there duly excepted.

And to further maintain the issue on his part the said defendant produced as a witness R. D. STEARNS, who, being duly sworn, testified as follows:

I am an attorney-at-law, and was such here in Lincoln in 1881. I prepared the deed, notes and mortgage at the time of the transaction between Mr. Keeler and Mr. Ewing; the papers were acknowledged before me, I believe, and after execution my recollection is the deed was taken to the county clerk's office. I am not sure whether the mortgage was ever recorded or not; think the notes were given to Ewing and the mortgage sent to Iowa to be executed by Keeler and his wife and returned to Ewing. Keeler was in my office a short time on Saturday, and the papers were, I think, executed on Monday. When Keeler came into my office on Monday he came to execute the papers, and was not there to exceed twenty or thirty minutes; think I prepared the papers while he was there, but am not positive. I had seen him on Sunday in Ewing's store and

on the street. The papers were not executed on Sunday;
43 they were executed early Monday morning at my office. The mortgage may have been taken by Keeler or sent by mail to Iowa to be executed by Mrs. Keeler; I have no recollection of hearing any conversation between Keeler and Ewing to the effect that it was necessary to make the deed to Keeler for the purpose of giving the United States court jurisdiction of an action to recover possession of the property; I gave no such advice to them. I have had conversation with Keeler with regard to bringing of this suit, but have had very little communication with him in regard to the suit since it was brought, the last of which was less than a month ago, I should say. He furnished some means for the prosecution of the suit—not very much; not to exceed twenty dollars. I retained Mr. Woolworth in the case, and Mr. Hull and I were partners at the time the suit was commenced, and Hull came into the case through my connection with it. No money passed at the time the papers were drawn. The last I heard of Ewing he was with his father, who was sick, in Shelbyville, Illinois; he was present at the time of the last trial in Omaha, but has not been here during this trial. I saw one of the notes that were given by Keeler at the time his deposition was taken in this case; I think Ewing gave me all of his papers, possibly including the other notes, when he went away; he gave me an envelope with a copy of the deed and some other papers, and they may be in that envelope; I don't know. There was no conversation between Keeler and Ewing in my presence in regard to any pending suit in the State court that I have any recollection [of]. In preparing the papers I was acting, I suppose, as attorney for both parties. Mr. Ewing asked me to prepare the deed, and Mr. Keeler asked me to prepare the notes and mortgage. I brought this suit for Mr.
Keeler; Mr. Ewing did not employ me to do so. I paid the
44 commencement fees—advanced them myself—and afterwards got them back from Keeler.

And on cross-examination the witness testified as follows:

My recollection is that there were three notes given by Keeler to Ewing; the first for one thousand dollars, the second for two thousand dollars, and the third for two thousand dollars; that the first note was due in thirty or sixty days, the second in six months, the third in a year; and to further maintain the issue on his part, the said defendant offered and read in evidence a deposition of the plaintiff, John W. Keeler, a copy of which is hereto attached, marked "K."

And to further maintain the issue on his part the said defendant produced as a witness JOHN H. MURTRY, who, being sworn, testified as follows:

I am in the real estate business in Lincoln, and have been for twelve years, and am acquainted with the value of real estate therein; I am acquainted with lot 9, in block 56, in the city of Lincoln. The tendency of real estate in said city during the years 1881 and 1882, say from May, 1881, to July, 1882, was upwards—was increasing in

value. The lot referred to was worth in July, 1882, from six thousand five hundred dollars to seven thousand five hundred dollars in cash; it was a valuable piece of property.

And on cross-examination the witness testified:

I mean that the lot was worth that much with a clear title. If the property was in litigation I would not have it. A tax title or anything of that kind would depreciate its value. The said defendant, to further maintain the issue upon his part, offered in evidence and read to the jury a certified copy of the mortgage from Keeler to Ewing, dated July 17th, 1882, filed for record November 29th, 1882, and recorded in Book "Y" of records of mortgages of Lancaster county, at page 175. A copy of said mortgage is hereto attached, and marked "L."

45 And to further maintain the issue on his part the said defendant produced on his part EDWIN R. SIZER, who, being sworn, testified as follows:

I am clerk of the second judicial district for the county of Lancaster, and have in my possession as such clerk the files in the case of Milton F. Lamaster *versus* Thomas Ewing, which I have here present. The action is still pending in the district court for Lancaster county.

And on cross-examination the said witness testified as follows:

I recognize among these files the petition for the removal of the case from the State court to the United States court, filed January 24th, 1882, together with a bond for such removal. I also recognize as one of the files in the same case a motion for substitution, filed October 14th, 1882.

And thereupon to further maintain the issue on his part the said defendant offered in evidence and read to the jury the petition filed in said case May 23rd, 1882, a copy of which, with the order allowing an injunction endorsed thereon, is hereto attached, marked "M;" also, the answer filed in the same case June 19th, 1882, a copy of which is hereto attached, marked "N;" also, the reply in the same case, filed July 8th, 1882, a copy of which is hereto attached, marked "O;" also, the order modifying the injunction made in the same case, a copy of which is hereto attached, marked "P."

It was then admitted by counsel for defendant that the question of the confirmation of the sale by the marshal to Ewing of the property in controversy was never taken to the Supreme Court of the United States, and that no proceedings were had to that end subsequent to the signing of the bill of exceptions, and thereupon, the testimony being concluded for both parties, the said defendant, by his attorney, requested the court to reduce his

46 instructions and charge to the jury to writing before giving the same to the jury, which the court refused to do; to which refusal said defendant, by his attorney, then and there excepted.

And thereupon the said defendant, by his attorney, requested the court, in writing, to instruct the jury as follows:

"I. The alleged judgment entered or extended by the clerk upon the docket against the defendant was null and void, and did not authorize the issue of an execution against the property of the defendant."

Which instruction the court refused to give; to which refusal the said defendant, by his attorney, then and there duly excepted.

"II. The execution upon which the property in question was sold by the marshal was invalid as to the defendant, and did not authorize the levy upon and sale of the said property."

Which instruction the said court refused to give; to which refusal the said defendant, by his attorney, then and there duly excepted.

"III. Upon the evidence in the action the plaintiff is not entitled to recover."

Which instruction the said court refused to give; to which refusal the said defendant, by his attorney, then and there duly excepted.

"IV. If the jury find that the defendant did not authorize the delivery of the stay bond in question, with his name thereto subscribed or affixed, and that, when the same was presented to the clerk of this court for acceptance and approval, the same was not perfect and complete, but, on the contrary, that the defendant's name originally subscribed to his affidavit respecting his property, or his sufficiency as a surety, had been visibly cut therefrom, and that the appearance of the bond so changed or mutilated was sufficient to put the clerk upon inquiry, and to notify him that the defendant had withdrawn from the bond, they are at liberty to find that the said
47 bond had not been delivered as the bond of the defendant."

Which instruction the court refused to give; to which refusal the said defendant, by his attorney, then and there duly excepted.

"V. The jury are to determine from all the evidence whether the alleged bond of the defendant was or not delivered by him as his bond; and, if they find that it was not, they should find for the defendant."

This instruction not given.

"VI. If the jury find that the plaintiff is not the real party in interest, but that he received the conveyance of the property, if at all, for the benefit of Ewing, and has no beneficial interest therein, and that this suit is being prosecuted solely for the benefit of Ewing, they should find the fact to be so.

"VII. The act of the Legislature of Nebraska respecting the stay of executions and orders of sale approved February 23d, 1875, was not operative to authorize the execution against Lamaster's property."

Which instruction the said court refused to give; to which refusal the said defendant, by his attorney, then and there duly excepted.

"VIII. The record introduced in evidence tends to show that at the time of the commencement of this action there was pending in the district court for Lancaster county, in this State, an action between the defendant herein, as plaintiff, and Thomas Ewing, the grantor of Keeler, the present plaintiff, involving and requiring the determination of the same issue of title as herein involved; and if you find that this was so, and that the plaintiff obtained the conveyance in question from Ewing pending the same action in the State court, and that the same is still pending, this is sufficient to abate the present action, and you should so find."

Which instruction the court refused to give; to which re-
48 fusal the said defendant, by his attorney, then and there duly excepted.

But the said court, on the contrary, instructed the jury to find a general verdict for the plaintiff. To which instruction the said defendant, by his attorney, then and there duly excepted.

And the said court also instructed the jury to return special findings upon the following propositions, to wit:

I. Did (or did not) this action arise under the laws of the United States?

II. Did (or did not) plaintiff, J. W. Keeler, and Thomas Ewing enter into an agreement or understanding whereby said plaintiff agreed to reconvey to said Ewing the said premises or hold the same for him?

And thereupon the said plaintiff, by his attorney, requested the court, in writing, to instruct the jury as follows, to wit:

I. The bond which has been introduced in evidence and recorded in a book kept by the clerk for the purpose, being perfect on its face and apparently executed by all whose names appear thereto, and among them by the defendant Lamaster, having no blanks for the insertion therein of the names of other parties or other defects or deficiencies, must be taken to be the bond of the parties signing the same, and among them of the defendant Lamaster, and binding him according to its terms.

If he directed Irwin not to deliver the bond as his bond and took his name from the affidavit of justification appended thereto, but through inattention left his name, signed by him, to the bond itself, these circumstances are not sufficient to avoid the instrument in the hands of the clerk and for the benefit of the parties who by means of it were deprived of rights and remedies upon their judgment. The jury will, therefore, disregard all the testimony given by the defendant Lamaster and his brother of what passed between them and Irwin after the defendant had executed the bond and
49 treat the instrument in all respects as one entered into by the defendant Lamasters voluntarily, intelligently, and binding upon him and his property, unless notice of the facts were communicated to the clerk or plaintiffs in the judgment.

Which instruction was given by the court; to which the said defendant, by his attorney, then and there duly excepted.

II. The filing of the defendant's bond with the clerk of this court and its approval by him, and also his approval of the sureties thereto, including the defendant, the record of the same, the entry of memoranda thereof in the judgment index, called in the statute "extending the judgment," justified the issue by the clerk of this court of an execution upon the judgment of Seymour and Wardell against Young and others, directed to the marshal, commanding him to make the balance due upon the judgment out of the property of the principals and sureties, including that of the defendant Lamasters, and the sale by the marshal of the defendant's property under and by virtue of the execution was authorized by law.

Which instruction was given by the court. To which the said defendant, by his attorney, then and there duly excepted.

III. I charge you that when this bond was taken by the clerk, as has been shown in evidence, and when the proceedings were taken thereon leading to the sale by the marshal of the property in question, the statute of this State passed on the 25th of February, 1875, and entitled "An act to provide for stay of executions and order of sales," was in force in this court and was a law therein, the same as in the district courts of the State.

Which instruction was given by the court; to which the said defendant, by his attorney, then and there duly excepted.

IV. The pendency of the alleged action between Lamasters and Ewing in the State court does not abate this suit or prevent in any wise the plaintiff from prosecuting the same.

Which instrument was given by the court; to which the said defendant, by his attorney, then and there duly excepted.

United States Circuit Court, District of Nebraska.

JOHN W. KEELER *vs.* MILTON F. LAMASTER.

It is hereby stipulated and agreed by and between the parties above named that the bill of exceptions in the above-entitled cause shall be prepared and served on the attorneys for plaintiff within twenty days from this date; that the same shall be examined and returned to the defendant's attorney within 20 days thereafter, and that said bill shall be presented to the judge of said court before whom said cause was tried for settlement and allowance within 20 days after the return of the same to defendant's attorney.

J. M. WOOLWORTH, *Pl'ff's Atty.*
GEO. W. DOANE, *Att'y for Def't.*

Omaha, Neb., Feb. 16, 1884.

If Mr. Hull has nothing to show upon the point reserved by him when at Lincoln I think the above all right.

J. M. WOOLWORTH,
One of Pl'ff's Att'ys.

O K. HULL.

"EXHIBIT A."

UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

The President of the United States of America to the marshal of the district of Nebraska, Greeting:

You are hereby commanded, as you have been heretofore commanded, that of the goods and chattels, and for want thereof,
51 then of the lands and tenements of William P. Young, debtor, and John I. Irwin, Jane Y. Irwin, W. T. Donovan, Milton F. Lamaster, and Nathan F. Moffitt, sureties, in your district, you cause to be made the sum of four thousand seven hundred forty-four and $\frac{31}{100}$ dollars, being the balance due April 2d, A. D. 1881, on the judgment of the circuit court of the United States for the district of Nebraska, at the November term thereof, in the year 1875, by which Charles W. Seymour and William W. Wardell recovered against the said William P. Young, with interest thereon from the second day of April, A. D. 1881, until paid, together with the further sum of ——, costs of increase on said judgment, and also the costs that may accrue on this writ. And have you the said moneys before the clerk of the said circuit court, at the city of Omaha, in said district, within sixty days, to be paid to the persons entitled to receive the same. And have you then and there this writ, with your doings thereon.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 14th day of April, A. D. 1881, and in the 105th year of the Independence of the United States of America.

[SEAL.] WATSON B. SMITH, *Clerk.*

Attached to said execution are papers in words and figures following, to wit:

A.

Appraisement.

In the Circuit Court of the United States for the District of Nebraska.

CHAS. W. SEYMOUR *et al. vs.* WM. P. YOUNG *et al.*

52 The undersigned, Ellis L. Bierbower, marshal of the United States for the district of Nebraska, and George P. Tucker and Charles M. Leighton, two disinterested freeholders, residents of Lancaster county, State and district of Nebraska, the said freeholders being duly sworn by said marshal to make a true and impartial appraisement of the defendant, Milton F. Lamaster's interest in the following property levied upon and taken by virtue of an execution issued out of the circuit court of the United States in the above-entitled cause, and wherein Charles W. Seymour *et al.* are plaintiffs, and Wm. P. Young *et al.* are defendants, do, upon our oaths, appraise said property at its real value in money, after deducting all prior liens thereon, to wit: Lot number nine, in block number fifty-six, in the city of Lincoln, Lancaster county, Nebraska, at the

sum of four thousand five hundred and forty-six and $\frac{06}{100}$ dollars ($4,546.06).

Given under our hands this 15th day of April, 1881.

ELLIS L. BIERBOWER,
Marshal of the United States for the District of Nebraska.
GEORGE P. TUCKER.
CHAS. M. LEIGHTON.

Appraisers' fees, $1.00 each, paid by marshal.

Endorsed: No. 138—C. In the circuit court of the United States, district of Nebraska. Chas. W. Seymour *et al. vs.* Wm. P. Young *et al.* Appraisement. Filed May 19, 1881. Watson B. Smith, clerk.

"A."

U. S. Marshal's Sale.

In the Circuit Court of the United States for the District of Nebraska.

CHARLES W. SEYMOUR *et al.*
vs.
WM. P. YOUNG, Debtor, and JOHN I. IRWIN, W. T. DONOVAN, MILTON F. LAMASTER and NATHAN F. MOFFITT, Sureties.

53 In pursuance and by virtue of a fifth *alias* execution issued out of the circuit court of the United States for the district of Nebraska, bearing date April 14th, 1881, and to me directed and delivered, I have levied upon and taken all the right, title, and interest of the aforesaid defendants, and especially that of said Milton F. Lamaster, in and to the following lands and tenements, to wit:

Lot number nine (9), in block number fifty-six (56), in the city of Lincoln, Lancaster county, Nebraska, all of which I shall expose to sale and sell to the highest and best bidder, at public sale, as the law directs, on the 17th day of May, 1881, at the hour of 3 o'clock in the afternoon of said day, at the west door of the United States post-office and court-house building, in the city of Lincoln, Lancaster county, Nebraska. Said sale is to satisfy a judgment of said court obtained at its November term, 1875, in favor of said Charles W. Seymour and William W. Wardell, plaintiffs, and against the said William P. Young *et al.* defendants.

ELLIS L. BIERBOWER,
U. S. Marshal. Dist. of Nebraska.

Affidavit of Publication.

THE STATE OF NEBRASKA, } ss:
Lancaster County, }

H. D. Hathaway, being duly sworn, deposes and says: That he is one of the publishers of the Nebraska State Journal, a newspaper published daily and weekly, and of general circulation in the county of Lancaster and State of Nebraska, and that the attached notice of

sale, Seymour *et al. vs.* Young *et al.*, was published in said newspaper for four weeks consecutively, the first insertion having been on the sixteenth day of April, 1881.

H. D. HATHAWAY.

Subscribed in my presence and sworn to before me, this 17th day of May, A. D. 1881.

[SEAL.] JAS. C. LEONARD,
Notary Public.

54 Printer's fee, $7.50.

Received payment.

54 DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that I received this writ on the 11th day of April, 1881, and on the 14th day of April, 1881, I levied the same upon the following described real estate, after making diligent search, and being unable to find any goods or chattels belonging to the within-named defendants, or either of them, whereof I could make the amount of this writ or any part thereof, to wit: Lot number nine (9), in block number fifty-six (56), in the city of Lincoln, Lancaster county, Nebraska, and thereupon having first obtained from the county treasurer, county clerk, and clerk of the district court for said county their several certificates of the liens and encumbrances upon said real estate, I summoned George P. Tucker and Charles M. Leighton, two disinterested freeholders, residents of said county, and having administered to them an oath to make a true and impartial appraisement of the defendant, Milton F. Lamaster's, interest in the real estate so levied upon, and thereupon said appraisement was made, and the same is hereto attached and made a part of this my return; and having first filed a copy thereof with the clerk of this court issuing this writ, I did, on the 16th day of April, 1881, advertise the said real estate to be sold by me at public sale, as the law directs, at the hour of three o'clock in the afternoon of the 17th day of May, 1881, at the west door of the United States post-office and court-house building, in the city of Lincoln, Lancaster county, Nebraska. A proof of said publication of notice of sale is hereto attached and made a part of this my return, said notice having been published in the Nebraska State Journal, a newspaper in general circulation in said county and State, and designated by the order of said court as a paper for such publication. More than thirty
55 days' notice of the time and place of said sale having been given, I thereupon proceeded to offer for sale, as the law directs, on said 17th day of May, 1881, at the hour of 3 o'clock in the afternoon of said day, at the west door of the United States post-office and court-house building, in the city of Lincoln, Lancaster county, Nebraska, the real estate hereinbefore fully described, and then and there sold the said real estate to the highest and best bidder therefor, viz: Lot number nine (9), in block number fifty-six (56), in the city of Lincoln, Lancaster county, Nebraska, to Thomas Ewing, for the sum of five thousand six hundred dollars ($5,600.00), he being

the highest and best bidder therefor, and said sum being more than two-thirds the appraised value thereof.

ELLIS L. BIERBOWER,
U. S. Marshal.

Upon the back of said execution appear endorsements in words and figures following, to wit: No. 138, Doc. C. United States circuit court, district of Nebraska. Chas. W. Seymour *et al. vs.* Wm. P. Young, 5th *alias* execution. Damages, (bal.), $4,744.31, interest from Ap'l 2, '81. Costs on execution. Marshal's —, 110.55. Returned and filed May 19th, 1881. Watson B. Smith, clerk. Lamb & Billingsley, plaintiff's attorneys.

"B."

Thereupon, afterwards, to wit, on the 27th day of May, 1881, a motion to set aside sale was filed in said case, which said motion is in words and figures following, to wit:

In the Circuit Court of the United States of America in and for the District of Nebraska.

CHARLES W. SEYMOUR and WILLIAM W. WARDELL, Plaintiff,
vs.
WILLIAM P. YOUNG.

And now comes the said Milton F. Lamaster, whose prop-
56 erty was claimed to be levied upon, and sold upon execution issued in said cause, bearing date April 14th, 1881, and moves the court to set aside said execution and sale, and for the reasons following:

The record shows that said Milton F. Lamaster has not had his day in court, and that there is no judgment against him.

The said Milton F. Lamaster, as pretended surety for the stay of execution in said cause, did not appear before the clerk of said court, and the said pretended stay bond, as far as Milton F. Lamaster is concerned, was not taken and approved by the clerk, and until such an appearance the said bond could not have the effect of a judgment against him, or justify the issuing of an execution against him.

In the taking and entering the pretended stay of execution the act to provide for stay of execution and orders of sale approved Feb. 23d, 1875, was not complied with, as shown by the said pretended stay bond, a certified copy of which is hereto attached, and there was no lawful authority to issue said execution against Milton F. Lamaster.

The said execution was issued to satisfy a judgment of eight hundred and nine and $\frac{59}{100}$ dollars, being balance due April 2nd, A. D. 1881, on the judgment, and the said execution was amended for a much larger sum without notice to defendant Lamaster, and the entire proceeding as to Milton F. Lamaster is without notice and without jurisdiction, and the said execution and sale and the whole proceeding, so far as the defendant, Milton F. Lamaster, is concerned, is void.

The said sale and the parties, plaintiff in said execution, and each of them, and their assigns, were enjoined from making said sale by an order of injunction issuing out of [the] district court of Lancaster county, of which said injunction the said plaintiffs, and
57 each of them, and their assigns, had notice several days prior to said sale, as appears by the records of the said district court of Lancaster county, in the State of Nebraska, in the second judicial district thereof.

The said sale was not advertised for thirty days prior to the making of the same. The sale was advertised in the "Weekly State Journal" on Friday, April 22nd, A. D. 1881; the sale took place on the 17th day of May, A. D. 1881.

The said execution is defective, and was issued without legal authority.

The said property was not advertised for "at least thirty days before the day of sale," as by law required.

The said Milton F. Lamaster has a good and sufficient defense to the pretended bond or writing obligatory for the reason that he never executed said pretended bond.

No judgment exists against Milton F. Lamaster under and by virtue of which his property can be reached.

The said Milton F. Lamaster has never had a day in court to make his defense to said claim or pretended judgment.

That the pretended stay bond under and by virtue of which said sale was made is void as against said Milton F. Lamaster for the following reasons: Said bond is not in form and not in the form required by law; said pretended stay bond is not signed by any principal; said bond is made to no one as obligee.

The clerk of said court had no legal authority to accept said pretended bond. That as [a] matter of fact said Lamaster only consented to become surety on said pretended bond upon the express condition that two other parties, to wit, ——, ——, should likewise become said bondsmen, and that said parties never signed said pretended bond in question, all of which was known to plaintiffs in execution, and said Milton F. Lamaster then took his name off from said pretended stay bond prior to the delivery thereof, and
58 while the same was in possession of said John Irwin, and before the same was delivered or filed in court; that if said pretended bond has on it the name of Milton F. Lamaster it is there by fraud, and without his knowledge or consent, and is in fraud of said Milton F. Lamaster.

Said Milton F. Lamaster did not justify or qualify on said bond, but expressly refused to go on said bond or to sign the same.

The appraisement of said property is not made as required by law, and the said appraisement was not and is not authorized by law.

The said levy and sale is not authorized by law, and there is no legal judgment upon which to —— an execution, as shown by the records in this cause.

EASTABROOK & MASON,
Att'ys for Lamaster.

Upon the back of said motion appear endorsements in words and figures following, to wit: No. 138—C. In circuit court of United States for the district of & State of Nebraska. Seymour and Wardell *vs.* Wm. P. Young. Motion to set aside execution & sale as to Lamaster. O. P. Mason, Eastabrook & Co.

"C."

Thereupon afterwards, at the May term of said court, on the 13th day of May, 1881, the following proceedings were had, as appears of record on folio 88, Journal G, of said court, to wit:

CHARLES W. SEYMOUR
vs.
WILLIAM P. YOUNG. } 88—G.

On motion of said plaintiffs, by their attorney, the clerk of this court is hereby directed to amend the 5th *alias* execution issued in this case, and now in the hands of the United States marshal, in accordance with the facts.

59 "D."

Thereupon afterwards, at the May term of said court, on the 1st day of September, 1881, the following proceedings were had and done, as appears of record on folio 213, Journal G, of said court, to wit:

CHARLES W. SEYMOUR *et al.*
vs.
WILLIAM P. YOUNG *et al.* } 138—C.

This cause having been heretofore submitted to the court on the exceptions of Milton F. Lamaster to the sale made by the U. S. marshal under an execution issued herein, and the court having duly considered the same, it is now on this day ordered and adjudged by the court that said exceptions be, and the same are hereby, overruled. It is further ordered, on motion of said plaintiffs, that the sale made by the marshal of this district on the 17th day of May, 1883, of lot number nine (9), in block fifty-six (56), in the city of Lincoln, Lancaster county, Nebraska, under an execution issued in this case, be, and the said sale and proceedings thereunder are hereby, approved and confirmed. And it is further ordered that Ellis L. Bierbower, as United States marshal, convey to the purchaser, Thomas Ewing, by deed in fee-simple, the lands and tenements so sold.

"E."

In the Circuit Court of the United States for the District of Nebraska.

CHARLES W. SEYMOUR and W. W. WARDELL, Plaintiffs,
vs.
WILLIAM P. YOUNG.

Be it remembered that at the May term of this court for the

60 year 1881, and on the first day of September, A. D. 1881, the Hon. Elmer S. Dundy, judge, presiding, come on to be heard the motion of the plaintiffs that the sale of real estate herein made on the 17th day of May, A. D. 1881, be confirmed by the court, and upon the order of the court that cause be shown why such sale should not be confirmed.

And thereupon, in support of the said motion, the plaintiffs presented to the court and read the execution issued out of this court, dated April 14th, 1881, which is in the words and figures following, to wit:

THE UNITED STATES OF AMERICA, } *District of Nebraska,* } *ss:*

The President of the United States of America to the marshal of the district of Nebraska, Greeting:

You are hereby commanded, as you have been heretofore commanded, that of the goods and chattels, and for want thereof, then of the lands and tenements, of William P. Young, debtor, and John I. Irwin, Jane Y. Irwin, W. T. Donovan, Milton F. Lamaster, and Nathan F. Moffitt, sureties, in your district, you cause to be made the sum of four thousand seven hundred forty-four and $\frac{31}{100}$ dollars, being the balance due April 2d, A. D. 1881, on the judgment of the court of the United States for the district of Nebraska, at the November term thereof, in the year 1875, by which Charles W. Seymour and William W. Wardell recovered against the said William P. Young, with interest thereon from the second day of April, A. D. 1881, until paid, together with the further sum of costs of increase on said judgment, and also the costs that may accrue on this writ, and have you the said moneys before the clerk of the said circuit court, at the city of Omaha, in said district, within sixty days, to be paid to the
61 persons entitled to receive the same; and have you then and there this writ with your doings thereon.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 14th day of April, A. D. 1881, and in the 105th year of Independence of the United States of America.

[SEAL.] WATSON B. SMITH, *Clerk.*

Said execution is endorsed as follows: No. 138—doc. C. United States circuit court, district of Nebraska. Chas. W. Seymour *et al vs.* Wm. P. Young, 5th alias execution. Damages (bal.), $4,744.31, interest from Ap'l 2, '81. Costs on execution. Marshal, 110.55. Returned and filed May 19th, 1881. Watson B. Smith, clerk. Lamb, Billingsley, plaintiff's attorney. No goods. Ellis L. Bierbower, U. S. marshal.

I hereby certify that I received this execution on the 14th day of April, 1881, and that, for want of goods and chattels, I did, on the 15th day of April, 1881, levy the same upon lot number nine (9), in block number fifty-six (56), in the city of Lincoln, Lancaster county,

Nebraska, and took all the right, title, and interest of the within-named defendant, Milton F. Lamaster, in and to the same.

ELLIS L. BIERBOWER,
U. S. Marshal.

Also the several papers accompanying and attached to the same, to wit, the return and certificate of sale of the marshal in the said district, which is in the words and figures following, to wit:

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that I received this writ on the 11th day of April, 1881, and on the 14th day of April, 1881, I levied
62 the same upon the following-described real estate after making diligent search, and being unable to find any goods or chattels belonging to the within-named defendants, or either of them, whereof I could make the amount of this writ, or any part thereof, to wit: Lot number nine (9), in block number fifty-six (56), in the city of Lincoln, Lancaster county, Nebraska, and thereupon, having first obtained from the county treasurer, county clerk, and clerk of the district court for said county their several certificates of the liens and encumbrances upon said real estate, I summoned George P. Tucker and Charles M. Leighton, two disinterested freeholders, residents of said county, and having administered to them an oath to make a true and impartial appraisement of the defendant, Milton F. Lamaster's, interest in the real estate so levied upon, and thereupon said appraisement was made, and the same is hereto attached and made a part of this my return; and having first filed a copy thereof with the clerk of the court issuing this writ, I did, on the 16th day of April, 1881, advertise the said real estate to be sold by me at public sale, as the law directs, at the hour of 3 o'clock in the afternoon of the 17th day of May, 1881, at the west door of the United States post-office and court-house building, in the city of Lincoln, Lancaster county, Nebraska. A proof of said publication of notice of sale is hereto attached and made a part of this my return, said notice having been published in the Nebraska State Journal, a newspaper in general circulation in said county and State and designated by the order of said court as a paper for such publication.

More than thirty days' notice of the time and place of said sale having been given, I thereupon proceeded to offer for sale, as the law directs, on the 17th day of May, 1881, at the hour of 3 o'clock in the afternoon of said day, at the west door of the United States
63 post-office and court-house building, in the city of Lincoln, Lancaster county, Nebraska, the real estate hereinbefore fully described, and then and there sold the said real estate to the highest and best bidder therefor, viz., lot number nine (9), in block fifty-six (56), in the city of Lincoln, Lancaster county, Nebraska, to Thomas Ewing, for the sum of five thousand six hundred dollars ($5,600.00), he being the highest and best bidder therefor, and said sum being more than two-thirds the appraised value thereof.

ELLIS L. BIERBOWER,
U. S. Marshal.

And the notice of sale of real estate, which is in the words and figures following, to wit:

U. S. Marshal's Sale.

In the Circuit Court of the United States for the District of Nebraska.

CHARLES W. SEYMOUR *et al.*
vs.
WM. P. YOUNG, Debtor, and JOHN I. IRWIN, W. T. DONOVAN, MILTON F. LAMASTER, and NATHAN F. MOFFITT, Sureties.

In pursuance and by virtue of a fifth *alias* execution issued out of the circuit court of the United States for the district of Nebraska, bearing date April 14th, 1881, and to me directed and delivered, I have levied upon and taken all the right, title, and interest of the aforesaid defendants, and especially that of said Milton F. Lamaster, in and to the following lands and tenements, to wit:

Lot number nine (9), in block number fifty-six (56), in the city of Lincoln, Lancaster county, Nebraska, all of which I shall expose to sale and sell to the highest and best bidder, at public sale, as the law directs, on the 17th day of May, 1881, at the hour of 3 o'clock in the afternoon of said day, at the west door of the United States
64 post-office and court-house building, in the city of Lincoln, Lancaster county, Nebraska. Said sale is to satisfy a judgment of said court obtained at its November term, 1875, in favor of said Charles W. Seymour and William W. Wardell, plaintiffs, and against the said William P. Young *et al.*, defendants.

ELLIS L. BIERBOWER,
U. S. Marshal, Dist. of Nebraska.

Together with the affidavit of the publication of said notice, which is in words and figures following, to wit:

THE STATE OF NEBRASKA, } *ss:*
Lancaster County, }

H. D. Hathaway, being duly sworn, deposes and says: That he is one of the publishers of the Nebraska State Journal, a newspaper published daily and weekly, and of general circulation in the county of Lancaster and State of Nebraska, and that the attached notice of sale, Seymour *et al. vs.* Young *et al.*, was published in said newspaper for four weeks consecutively, the first insertion having been on the sixteenth day of April, 1881.

H. D. HATHAWAY.

Subscribed in my presence and sworn to before me, this 17th day of May, A. D. 1881.

[SEAL.] JAS. C. LEONARD,
Notary Public.

Printer's fee, $7.50.

And the request addressed to the clerk of the district court of Lancaster county, and his reply thereto, which are in the words—

To the clerk of the district court of Lancaster county, Nebraska:

You will please certify to me the amount and character of all liens and encumbrances on the following-described real estate, as shown by the records of your office, to wit:

Lot nine (9), block fifty-six (56), in the city of Lincoln, Lan-
65 caster county, Nebraska.

Given under my hand this 14th day of April, 1881.

ELLIS L. BIERBOWER,
U. S. Marshal.

STATE OF NEBRASKA, } *ss:*
Lancaster County, }

To Hon. Ellis L. Bierbower:

After dilligent search I can find no judgment liens of record against Milton F. Lamaster upon judgment record in my office.

Witness my hand and official seal at Lincoln, Neb., this 14th day of April, A. D. 1881.

[SEAL.] A. D. BURR, *Clk D. C.*

Fee, $2.00.
Paid by U. S. marshal.

And the request addressed to the county treasurer of Lancaster county, Nebraska, and his reply thereto, which are in the words and figures following, to wit:

To the county treasurer of Lancaster county, Nebraska:

You will please certify to me the amount and character of all liens and encumbrances on the following-described real estate, as shown by the records of your office, to wit:

Lot nine (9), block fifty-six (56), in the city of Lincoln, Lancaster county, Nebraska.

Given under my hand, this 14th day of April, 1881.

ELLIS L. BIERBOWER,
U. S. Marshal.

Ellis L. Bierbower, U. S. Marshal.

SIR: Lot 9, in block 56, Lincoln, was sold for 1876 taxes, and the 1877 taxes were paid by the purchaser. The amount necessary to redeem is $371.20.

66 The taxes for year 1880 are unpaid, amounting to 182.74.

There are no other tax liens, as shown by records of this office.

LOUIS HELMER,
County Treas.

COUNTY TREASURER'S OFFICE,
LANCASTER COUNTY, NEBR.,
LINCOLN, *April* 15, '81.

Fees, $2.00.
Paid by U. S. marshal.

And the request, addressed to the county clerk of Lancaster county, Nebraska, and his reply thereto, which are in the words and figures following, to wit:

To the county clerk of Lancaster county, Nebraska:

You will please certify to me the amount and character of all liens and encumbrances on the following-described real estate, as shown by the records of your office, to wit: Lot nine (9), block fifty-six (56), in the city of Lincoln, Lancaster county, Nebraska.

Given under my hand, this 14th day of April, 1881.

ELLIS L. BIERBOWER,
U. S. Marshal.

Party-Wall Agreement.

J. E. Lamaster with J. W. Winger. Dated March 9, 1880. Filed for record July 5, 1880.

Permission to build brick wall 6 inches in width on the west line of said lot 9, block 56, to be sold to said Lamaster or assigns when said wall is joined to a building on lot 10, block 56, at price to be agreed upon by three disinterested mechanics.

I, L. E. Cropsey, county clerk, certify that the above and foregoing is a true and complete statement of the incumbrances on lot 9, block 56, as appears from the numerical indexes in this office.

Witness my hand and seal of Lancaster county, Nebraska, this 15th April, A. D. 1881, at 9 a. m.

[SEAL.]

L. E. CROPSEY,
County Clerk.

67 *Abstract of Title to the Lot No. 9, Block 56, of the City of Lincoln, State of Nebraska.*

No.	Grantors.	Grantees.	Kind of instrument.	Date.	Cou's.	Date of ack'n't.	Title of officer and his residence.	When filed.	Book.	Page.	Part of section—S., T., R.
				Mo. D'y. Y'r.		*Mo. D'y. Y'r.*		*Mo. D'y. Y'r.*			
1	State of Nebraska.....	Milton F. Lamaster..	Deed.....	Dec. 30, 1867	$529	....	D. Butler, Gov.....	July 18, 1868	B.	64	Lot 9, B. 56.*
2	Milton F. Lamaster, unmarried.	Chas. W. Foster.....	Warranty D.	Dec. 7, 1876	$4,050	Dec. 7, 1876	Abr. Yeazel, N. P...	Dec. 7, 1876	T.	538	Same.*
3	C. W. Foster & wife.....	J. E. Lamaster.....	Q. C. D.....	Aug. 30, 1877	$500	Aug. 30, 1877	T. E. Clark, N. P...	Sept. 8, 1877	J.	229	Same.*
4	J. E. Lamaster.....	J. W. Winger...	Contract.....	Mar. 9, 1880	.....	Mar. 9, 1880	N. C. Abbott, N. P..	July 5, 1880	C.	257	West 6 inches, lot 9, B. 56.†
5	Joseph E. Lamaster & wife.	Charles W. Foster...	Q. C. D.....	July 20, 1880	$100	July 20, 1880	T. Appleget, N. P..	Aug. 12, 1880	Q.	534	Lot 9, B. 56, W. O. P.†

Miscellaneous Memorandum. (*Instructions below must be strictly followed.*)

*With other property.

† Permission to build brick wall on west 6 inches, to be purchased by Lamaster or assigns, at price to be fixed by three disinterested mechanics.

(5 directions for filling up abstract—printed.)

67½ With the exhibit or contract attached to the clerk's reply, also the appraisement of said property, which is in the words and figures following, to wit:

Appraisement.

In the Circuit Court of the United States for the District of Nebraska.

CHAS. W. SEYMOUR *et al. vs.* WM. P. YOUNG *et al.*

The undersigned, Ellis L. Bierbower, marshal of the United States for the district of Nebraska, and George P. Tucker and Charles M. Leighton, two disinterested freeholders, residents of Lancaster county, State and district of Nebraska, the said freeholders being duly sworn by said marshal to make a true and impartial appraisement of the defendant, Milton F. Lamaster, entered in the following property levied upon and taken by virtue of an execution issued out of the circuit court of the United States in the above-entitled cause, and wherein Charles W. Seymour *et al.* are plaintiffs and Wm. P. Young *et al.* are defendants, do upon our oaths appraise said property at its real value in money, after deducting all prior liens thereon, to wit, lot number nine, in block number fifty-six, in the city of Lincoln, Lancaster county, Nebraska, at the sum of four thousand five hundred and forty-six and $\frac{06}{100}$ dollars ($4,546.06).

Given under our hands, this 15th day of April, 1881.

ELLIS L. BIERBOWER,
Marshal of the United States for the District of Nebr.
GEORGE P. TUCKER.
CHAS. M. LEIGHTON.

And the said Milton F. Lamaster named in the said execution did then and there oppose and object to the confirmation of the
68 said sale, and did insist that the same was irregular, illegal, and void, and in support of said objection he presented to the court and read his affidavit, in the words and figures following, to wit:

In the District and Circuit Court of the United States for the State of Nebraska.

SEYMOUR and WARDELL *vs.* YOUNG.

Milton F. Lamaster, being duly sworn, says that some time in the month of November, 1875, he was requested by John Irwin to sign a bond in the above-entitled case, and that he agreed to do so; that among the inducements and the principal thereof he was to get the names of two other responsible men, whose names he does not now remember, being at Nebraska City to sign the same, neither of which, however, appears therein; that this affiant signed said bond while in the hands of said Irwin to be perfected as aforesaid; that he signed the same and the justification thereto at nearly the same time; that afterwards, and in the evening of the same day, he called again upon the said John Irwin, in whose hands the said bond re-

mained unchanged by the addition of any other names, and stated to him that he wished to take his name from the bond, and refused longer to be considered as a surety thereon, and thereupon he, this affiant, removed his name from the justification attached to the bond, supposing that he had removed the same from the body of the bond, and intending to do so; that said purpose and design were understood by both this affiant and the said Irwin, and by both it was understood that his, this affiant's, name was wholly taken from the bond, and such was the understanding when said bond was filed.

Which affidavit was, on motion of plaintiffs, stricken from
69 the files of this court by the court.

And this affiant further saith that at the time his said name was so as aforesaid removed from said bond the name of Nathan R. Moffitt was not thereon, as he verily believes.

MILTON F. LAMASTER.

Subscribed in my presence and sworn to before me this 14th day of June, 1881.

WATSON B. SMITH, *Clerk.*

And the said Milton F. Lamaster did specify and point out, among others, the following defects and insufficiencies in the said sale and the proceedings therewith connected, to wit:

That the said instrument purporting to be a surety bond was not his bond or deed for the reasons set forth in his said affidavit.

That he did not justify as to his sufficiency, or as such alleged surety, or make affidavit as such, as required by law.

That he was not approved as such surety as required by law.

That said court had not jurisdiction to issue said execution against the property of said Lamaster, or render any judgment against him, or entertain or take any proceedings against him or his property as such alleged surety.

That the said sale had been enjoined by due proceedings therefor.

That the said notice of sale was insufficient, and was not given in such manner or published for such time as is by law required in that behalf.

That there was no judgment upon which said execution could lawfully be issued.

That there was no law nor rule of the said court authorizing the issuing of said execution against the said Lamaster as a surety.

70 And it is herein further set forth that the foregoing stay bond heretofore referred to in this bill of exceptions was filed, approved on the 2nd day of December, A. D. 1875, and was entered in the records of the circuit court of the United States of the district of Nebraska, by Watson B. Smith, clerk of said court.

And it further appears in this case that an act of the Legislature of the State of Nebraska entitled "An act to provide for the stay of executions and orders of sale," approved February 23, 1875, was adopted by the circuit court of the United States in the district of Nebraska as follows, to wit:

Proceedings of the Circuit Court of the United States of the District of Nebraska.

SATURDAY, *December* 30, 1876.

Court met this day, pursuant to adjournment.

Present: The same judge as yesterday, to wit, Elmer S. Dundy, judge; Watson B. Smith, clerk; William Daily, United States marshal.

Order Adopting State Law Relative to Proceedings on Execution.

Ordered, That the laws of the State of Nebraska now in force regulating the issuing of executions and all the proceedings to be had thereon and thereunder be, and the same are hereby, adopted as the rules of procedure to enforce the collections of judgments in the United States circuit and district court for said State.

UNITED STATES,
STATE OF NEBRASKA, } *ss:*
County of Douglas,

I, Elmer D. Frank, clerk of the circuit court of the United States of the district of Nebraska, do hereby certify that at the time the execution copied and set forth and made a part of this bill of
71 exceptions was issued *that* there was only due from the defendants to plaintiffs, on the judgment rendered in this case, the sum of $4,744.31, and that amount was the amount endorsed on said execution. And I hereby further certify that two other sales in this case where the property of the sureties had been sold have been confirmed by this court, and no objection was raised by the defendant, Milton F. Lamaster.

Witness my hand and official seal this 20th day of January, A. D. 1882.

[SEAL.] ELMER D. FRANK, *Clerk.*

And it is herein further set forth that the following motion was made by plaintiff and sustained by the court to strike the affidavit of Milton F. Lamaster from the files of the court, to wit: (Affidavit above copied, sworn to June 14, 1881.) And the said motion to confirm said sale and objections thereto were heard upon the several papers aforesaid only, and the judgment in said action and the said bond or instrument, purporting to be a bond for the stay of execution, which is in the words and figures following, to wit:

Whereas Charles W. Seymour and W. W. Wardell did, at the Nov. term, 1875, of the United States circuit court, holden at Omaha, within and for the district of Nebraska, recover a judgment in said court against William P. Young for the sum of six thousand and five hundred dollars damages and for their costs in and about said suit:

Now, therefore, we, John Irwin, Jane Y. Irwin, and William T. Donovan, Nathan F. Moffitt, and Milton F. Lamaster, freeholders in the State of Nebraska, do hereby acknowledge ourselves security

for the defendant for the payment of the judgment, interest and costs from the time of rendering of said judgment until paid, to be paid in nine months from the rendering of the same.

JOHN I. IRWIN.
JANE Y. IRWIN.
W. T. DONOVAN.
MILTON F. LAMASTER.
NATHAN R. MOFFITT.

72 STATE OE NEBRASKA, } ss:
Douglas County, }

John Irwin, being first duly sworn, does on oath say: That he is a resident and a freeholder of the State of Nebraska, and that he owns real estate in the State of Nebraska, not exempt from execution and aside from incumbrances, to the value of forty thousand dollars.

JOHN IRWIN.

Subscribed in my presence and sworn to before me, this 25th day of November, 1875.

WATSON B. SMITH, *Clerk.*

STATE OF NEBRASKA, } ss:
Lancaster County, }

Jane Y. Irwin, being first duly sworn, does on oath depose and say: That she is a resident and freedolder in the State of Nebraska; that she owns real estate, not exempt from execution and aside from incumbrances, to the value of seventeen thousand dollars.

JANE Y. IRWIN.

Subscribed in my presence and sworn to before me, this 19th day of Nov., 1875.

[SEAL.] J. STUART DALES,
Notary Public.

STATE OF NEBRASKA, } ss:
Lancaster County, }

William T. Donovan, being first duly sworn, does on oath depose and say: That he is a resident and a freeholder of the county of Lancaster, State of Nebraska; that he owns real estate, not exempt from execution and aside from incumbrances, to the value of five thousand dollars.

W. T. DONOVAN.

Subscribed in my presence and sworn to before me, this 19th day of Nov., 1875.

[SEAL.] J. STUART DALES,
Notary Public.

73 STATE OF NEBRASKA, } ss:
County of Otoe, }

Natham R. Moffitt, being first duly sworn, does on oath say: That he is a resident and freeholder of the State of Nebraska, and that he

owns real estate in the State of Nebraska, not exempt from execution and aside from incumbrances, to the value of six thousand ($6,000.00) dollars.

NATHAN R. MOFFITT.

Subscribed in my presence and sworn to before me, this 24th day of November, A. D. 1875.

[SEAL.] W. F. N. HOUSER,
Deputy Clerk, District Court in and for Otoe County, Neb.

And thereupon the court ordered that the said objections to the confirmation of said sale be overruled; to which order and ruling the said Milton F. Lamaster then and there duly excepted, and further ordered that said sale be confirmed and the marshal execute a deed of said real estate to the purchaser. And at his request the judge of said court presiding does hereby subscribe his name to the said proceedings and exceptions.

ELMER S. DUNDY, *Judge.*

Filed 21 January, 1882.

Upon the back of said exceptions appear endorsements in words and figures following, to wit:

NEBRASKA CITY, NEBRASKA, *October 10th, A. D.* 1881.

This is not a correct bill of exceptions to be presented to the judge in this case, and I protest against the judge in this case signing this statement of exception- for the reason the same is not correct, and that the judge has no jurisdiction to sign a bill of exception- or allow a writ of error in this case, and was not presented within the time required by law.

C. W. SEYMOUR.

74 "F."

Marshal's Deed.

Ellis L. Bierbower, U. S. marshal, to Thomas Ewing. Filed for record, May 11th, 1882, at 4 a. m.

J. H. McCLAY,
County Clerk.

Know all men by these presents, that whereas, at the November term, A. D. 1875, of the circuit court of the United States for the district of Nebraska, Charles W. Seymour and William W. Wardell, plaintiffs, recovered a judgment against William P. Young, debtor, and John I. Irwin, Jane Y. Irwin, W. T. Donovan, Milton F. Lamaster, and Nathan F. Moffitt, sureties, defendants, for the sum of six thousand five hundred dollars and costs of suit, taxed at eight hundred and fifteen dollars and ninety-seven cents, and whereas by virtue of 5th *alias* execution, issued by Watson B. Smith, clerk of the circuit court of the United States for the district of Nebraska, and under the seal of said court, bearing date the fourteenth day of April, A. D. 1881, and directed to the marshal of the district of Nebraska,

commanding him to cause to be levied of the goods and chattles, and for want thereof, of the lands and tenements, of the said William P. Young, debtor, and John I. Irwin, Jane Y. Irwin, W. T. Donovan, Milton F. Lamaster, and Nathan F. Moffitt, sureties, defendants, sufficient to satisfy the said Charles W. Seymour and William W. Wardell, plaintiffs, being the sum of four thousand seven hundred and forty-four dollars and thirty-one cents, said sum being the balance due on the second day of April, A. D. 1881, and all accruing costs, the marshal, as aforesaid, did, on the fourteenth day of April, A. D. 1881, for want of goods and chattels levy on and seize the following lands of the said Milton F. Lamaster, to wit: Lot number nine (9), in block number fifty-six (56), in the city of Lincoln, in
75 Lancaster county, Nebraska; and whereas the marshal, as aforesaid, under and by virtue of the said execution, did summon two disinterested freeholders, residents of said Lancaster county, and State and district of Nebraska, and having administered to them an oath impartially to appraise the said defendant Milton F. Lamaster's interest in the said lands and tenements so levied upon, and the said marshal, together with the said freeholders, having made an appraisement, in writing, of said lands and tenements, a copy of which said appraisement was filed in the office of the clerk of said circuit court of the United States for the district of Nebraska, and thereupon the said marshal did advertise said sale to take place, as the law directs, on the seventeenth day of May, A. D. 1881, at the hour of 3 o'clock in the afternoon of said day, at the west door of the United States post-office and court-house building, in the city of Lincoln, in Lancaster county, Nebraska, and having given notice of the time and place of said sale for not less than thirty days prior thereto in the Nebraska State Journal, a newspaper printed and in general circulation in said county of Lancaster, and district and State of Nebraska. The first publication of said notice was on the sixteenth day of April, A. D. 1881, and said newspaper being one of the newspapers designated by order of said court for such publication.

On the said seventeenth day of May, A. D. 1881, the day on which the said premises were advertised to be sold, as aforesaid, the said marshal attended at the time and place fixed for said sale, and exposed for sale at public auction to the highest and best bidder, and the said lands and tenements, to wit, lot number nine (9), in block fifty-six (56), in the city of Lincoln, in Lancaster county, Nebraska, were there and then sold to Thomas Ewing for the sum of five thousand six hundred dollars, he being the highest bidder therefor, and said sum being
76 not less than two-thirds of the appraised value thereof, which sale was afterwards, at the May term of said circuit court of the United States for the district of Nebraska, A. D. 1881, holden at the city of Omaha, in said district, on the first day of September, A. D. 1881, examined and confirmed by the said court, and Ellis L. Bierbower, the said marshal of the United States for the district of Nebraska, ordered by said court to make a deed to said Thomas Ewing, the purchaser as aforesaid.

Now, therefore, I, Ellis L. Bierbower, marshal of the United States for the district of Nebraska as aforesaid, in consideration of the

premises, and by virtue of the powers vested in me by law, do hereby give, grant, and convey to the said Thomas Ewing, his heirs and assigns, all the estate, right, title, and interest in and to the lands and tenements sold as aforesaid of which the said Milton F. Lamaster, defendant, was seized and possessed on the twelfth day of November, A. D. 1875, or at any time thereafter, to wit:

Lot number nine (9), in block number fifty-six (56), in the city of Lincoln, Lancaster county, Nebraska, with all the appurtenances thereunto belonging. To have and to hold the same to the said Thomas Ewing, his heirs and assigns, to them and their use and behoof forever.

In testimony whereof I have, as such marshal of the United States for the district of Nebraska, hereunto set my hand, this 9th day of May, A. D. 1882.

ELLIS L. BIERBOWER,
Marshal of the United States for the District of Nebraska.

Executed in presence of—
C. H. HAMLIN.
O. F. LAMBERTSON.

THE STATE OF NEBRASKA, } ss:
Douglas County, }

On the 9th day of May, A. D. 1882, before me, G. Stevenson, notary public in and for said Douglas county, Nebraska, personally
77 appeared Ellis L. Bierbower, marshal of the U. S. for the district of Nebraska, to me well known to be the identical person described in and who executed the foregoing instrument of conveyance, and who acknowledged said instrument to be his voluntary act and deed as said marshal for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my official seal, this 9th day of May, A. D. 1882.

[SEAL.] G. STEVENSON,
Notary Public.

THE STATE OF NEBRASKA, } ss:
Lancaster County, }

I, J. H. McClay, county clerk of said county, hereby certify that the above and foregoing is a true and correct copy of a deed, as appears of record in this office in deed record No. 11 at pages 596, &c.

In testimony whereof I have hereunto set my hand and affixed the seal of said county, at the city of Lincoln, this 4th day of December, A. D. 1883.

[SEAL.] J. H. McCLAY,
County Clerk.

"G."

Know all men by these presents that I, Thomas Ewing (an unmarried man), of the county of Lancaster and State of Nebraska, for and in consideration of the sum of five thousand ($5,000.00) dollars

in hand paid, do hereby grant, bargain, sell, convey, and confirm unto John W. Keeler, of the county of Decatur and State of Iowa, the following-described real estate, situated in Lincoln, in Lancaster county and State of Nebraska, to wit, lot numbered nine (9), in block numbered fifty-six (56), in the city of Lincoln, according to original plat; and I do hereby covenant with the said John W. Keeler and his heirs and assigns that I am lawfully seized of said prem-
78 ises; that they are free from incumbrance; that I have good right and lawful authority to sell the same. And I do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever.

Signed this 17th day of July, A. D. 1882.

THOMAS EWING.

In presence of—
R. D. STEARNS.

THE STATE OF NEBRASKA, } ss:
Lancaster County, }

On this 17th day of July, A. D. 1882, before me, R. D. Stearns, a notary public duly appointed and qualified for and residing in said county, personally came Thomas Ewing (an unmarried man), to me known to be the identical person described in and who executed the foregoing conveyance as grantor, and acknowledged the said instrument to be his voluntary act and deed.

Witness my hand and notarial seal, the day and year last above written.

[SEAL.] R. D. STEARNS,
Notary Public.

THE STATE OF NEBRASKA, } ss:
Lancaster County, }

I, J. H. McClay, county clerk of said county, hereby certify that the above and foregoing is a true and correct copy of a warranty deed as appears of record in this office in deed record 14, at page 80.

In testimony whereof I have hereunto set my hand and affixed the seal of said county, at the city of Lincoln, this 23rd day of January, A. D. 1884.

[SEAL.] J. H. McCLAY,
County Clerk,
By F. McCLUSKY, *Deputy.*

Endorsed: Warranty deed from Thomas Ewing to John W. Keeler.

THE STATE OF NEBRASKA, } ss:
Lancaster County, }

79 Entered on numerical index and filed for record in the clerk's office of said county the 17th day of July, 1882, at 11 o'clock and 25 minutes a. m., and recorded in book 14 of deeds, on page 80.

J. H. McCLAY,
County Clerk.

"H."

Thereupon, afterwards, at the November term of said court, on the 30th day of December, 1876, the following proceedings were had, as appears of record on folio 733, Journal "C," of said court, to wit:

Order Adopting State Law Relative to Proceedings on Execution.

Ordered, That the laws of the State of Nebraska now in force regulating the issuing of executions, and all the proceedings to be had thereon and thereunder, be, and the same are hereby, adopted as the rules of procedure to enforce the collection of judgments in the United States circuit and district courts for said State.

80 "I."

Whereas Charles W. Seymour and W. W. Wardell did, at the Nov. term, 1875, of the United States circuit court, holden at Omaha, within and for the district of Nebraska, recover a judgment in said court against William P. Young for the sum of six thousand and five hundred dollars damages, and for their costs in and about said suit:

Now, therefore, we, John Irwin, Jane Y. Irwin, and William T. Donovan, Nathan F. Moffitt, and Milton F. Lamaster, freeholders in the State of Nebraska, do hereby acknowledge ourselves security for the defendant for the payment of the judgment, interest, and costs from the time of rendering of said judgment until paid, to be paid in nine months from the rendering of the same.

JOHN IRWIN.
JANE Y. IRWIN.
W. T. DONOVAN.
MILTON F. LAMASTER.
NATHAN R. MOFFITT.

STATE OF NEBRASKA, } *ss:*
Douglas County, }

John Irwin, being first duly sworn, does on oath, say- that he is a resident and a freeholder of the State of Nebraska, and that he owns real estate in the State of Nebraska, not exempt from execution and aside from incumbrances, to the value of forty thousand dollars.

JOHN IRWIN.

Subscribed in my presence and sworn to before me this 25th day of November, 1875.

WATSON B. SMITH, *Clerk.*

STATE OF NEBRASKA, } *ss:*
Lancaster County, }

Jane Y. Irwin, being first duly sworn, does, on oath, depose and say that she is a resident and freeholder in the State of Nebraska;
81 that she owns real estate, not exempt from execution and aside from incumbrances, to the value of seventeen thousand dollars.

JANE Y. IRWIN.

Subscribed in my presence and sworn to before me this 19th day of Nov., 1875.

[SEAL.] J. STEWART DALES,
Notary Public.

STATE OF NEBRASKA, } ss:
Lancaster County. }

William T. Donovan, being first duly sworn, does, on oath, depose and say that he is a resident and a freeholder of the county of Lancaster, State of Nebraska; that he owns real estate, not exempt from execution and aside from incumbrances, to the value of five thousand dollars.

W. T. DONOVAN.

Subscribed in my presence and sworn to before me this 19th day of Nov., 1875.

[SEAL.] J. STUART DALES,
Notary Public.

82 STATE OF NEBRASKA, } ss:
County of Otoe, }

Nathan R. Moffitt, being first duly sworn, does on oath say that he is a resident and freeholder of the State of Nebraska, and that he owns real estate in the State of Nebraska, not exempt from execution and aside from incumbrances, to the value of six thousand ($6,000.00) dollars.

NATHAN R. MOFFITT.

Subscribed in my presence and sworn to before me this 24th day of November, A. D. 1875.

[SEAL.] W. F. N. HOUSER,
Deputy Clerk District Court in and for Otoe County, Neb.

Upon the back of said bond appear endorsements in words and figures following, to wit: No. 138—C. In U. S. cir. court. Chas. W. Seymour *et al. vs.* Wm. P. Young. Bond for stay. Filed Nov. 25, 1875. Watson B. Smith, clerk. Approved Dec. 2, 1875. Watson B. Smith, clerk.

"K."

UNITED STATES OF AMERICA, *District of Nebraska.*

STATE OF IOWA, } ss:
County of Decatur, }

Be it remembered that on this 3rd day of November, 1882, I, S. A. Gates, a notary public in and for [the] county and State aforesaid, appointed, duly commissioned, and qualified, and by the laws of the United States authorized and empowered to take depositions in causes pending in the circuit court of the United States, did call and cause to be and personally appear before me, at the office of S. A. Gates, in Leon, in the county of Decatur and State of
83 Iowa, and in the district of Iowa, John W. Keeler to testify and the truth to say on the part and behalf of the defendant

in a certain suit or matter of controversy now depending and undetermined in the circuit court of the United States for the district of Nebraska, at Omaha, in the district aforesaid, wherein John W. Keeler is pl'ff and Milton F. Lamaster is defendant, and the said J. W. Keeler being about the age of 43 years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said J. W. Keeler, and he did thereupon depose, testify, and say as follows, viz:

Int. 1. State your name, age, place of residence, and occupation.

Ans. 1. Name, J. W. Keeler; age, 43 years; residence, Decatur county, Iowa; occupation, farmer.

Int. 2. About how far do you reside from Omaha, Neb.?

Ans. 2. About one hundred and fifty miles, I think; could not say exact.

Int. 3. Are you acquainted with the property in dispute?

Ans. 3. Yes, sir; I have seen the property.

Int. 4. Who is the owner of that property?

Ans. 4. As far as my knowing who the owner is I am not able to tell.

Int. 5. State whether or not you ever purchased it.

Ans. 5. I did.

Int. 6. From whom?

Ans. 6. From T. Ewing.

Int. 7. When?

Ans. 7. My best recollection is it was some time in July, 1882.

Int. 8. Where was the trade made?

Ans. 8. In Lincoln, Nebraska.

84 Int. 9. Who was present?

Ans. 9. Mr. Ewing, Mr. Stearns, and myself.

Int. 10. How much was the consideration?

Ans. 10. Five thousand dollars.

Int. 11. How much did you pay down, if anything?

Ans. 11. At that time I did not pay anything.

Int. 12. Have you ever paid anything, and, if so, how much?

Ans. 12. Since that time I have lifted one note of a thousand dollars.

Int. 13. When was that?

Ans. 13. I can't give you the date, but I paid it when the note was sent to me for collection.

Int. 14. About how long ago?

Ans. 14. About a month ago, I think, according to my best recollection.

Int. 15. Have you that note?

Ans. 15. I have, at home.

Int. 16. How did you send the money?

Ans. 16. By a draft.

Int. 17. How much was the draft?

Ans. 17. One thousand dollars to Mr. Ewing, and five dollars to Mr. Stearns as fee.

Int. 18. Did Mr. Ewing send the money to you to pay that?

Ans. 18. He did not.

Int. 19. Did you ever receive money from Mr. Ewing or any other *other* person to make that payment?

Ans. 19. I did not.

Int. 20. Have you received any money from Mr. Ewing or any other person for him since that time?

Ans. 20. Not for the payment of that note.

Int. 21. Was it not understood between you and Mr. Ewing that that money should be returned to you?

Ans. 21. It was not.

85 Int. 22. Have you received any money or drafts from Mr. Ewing since you sent that to him?

Ans. 22. I have not.

Int. 23. Have you at any time received any letters from Mr. Ewing relative to your purchasing that property?

Ans. 23. I received a letter at the time I received the note.

Int. 24. Where is that letter?

Ans. 24. I can't say whether I have it at home or not.

Int. 25. What was stated in that letter in reference to this property?

Ans. 25. There was nothing in reference to this property.

Int. 26. Did you not receive a letter from T. Ewing prior to the time you went to Lincoln in July?

Ans. 26. I have received a great many letters from him prior to that time.

Int. 27. I mean just prior to your going out there?

Ans. 27. My best recollection is that I did not.

Int. 28. Did you ever receive any letters from T. Ewing or any person for him in relation to the purchase of this property?

Ans. 28. Some two or three months prior to the time I went out there I received a letter from Mr. Ewing, stating that he had a piece of property he would like to sell me.

Int. 29. Is that the only letter you received from him in regard to this property?

Ans. 29. That is the only one except the one when the note came.

Int. 30. Where is that first letter?

Ans. 30. It is not my practice, and never has been, to file letters away. It may be at home; I can't say.

Int. 31. What did he say his reasons were for wanting to sell you the property?

86 Ans. 31. I don't believe he gave me the reasons in that letter.

Int. 32. Did you go to Lincoln to buy this property?

Ans. 32. I did not, from the fact that I had not seen the property at that time.

Int. 33. You knew at the time you took the deed that there was a suit pending to set aside the title to Ewing, did you not?

Ans. 33. I did.

Int. 34. What did Mr. Ewing say was his object in selling the property?

Ans. 34. I don't recollect of his giving me any special object.

Int. 35. What did Mr. Stearns say about it, if anything?

Ans. 35. I had but very little if any conversation with him about the property. He made out the papers.

Int. 36. What paper did he make out?

Ans. 36. The deed and the mortgage, and filled out the notes.

Int. 37. Is there any other written contract between you and Mr. Ewing in regard to this property, besides the deed, note, and mortgage?

Ans. 37. There is not.

Int. 38. You are the plaintiff in this action, are you not, Mr. Keeler?

Ans. 38. Yes, sir.

Int. 39. Did you order this suit brought?

Ans. 39. I left that with my attorney, as I am not a lawyer myself.

Int. 40. Who is your attorney?

Ans. 40. Mr. Stearns.

Int. 41. What was your object in buying the property while it was in litigation?

87 Ans. 41. My object was this: That if I got that property for that amount of money it would make me some money, knowing at the same time that Mr. Ewing was amply able to make my warranty good to me.

Int. 42. Was it understood that Ewing was to pay the expenses of litigation?

Ans. 42. As a matter of course, if I fail to get my warranty sustained, I will look to Mr. Ewing for all money I am out.

Int. 43. Was it not understood that Mr. Ewing was to pay the expenses of litigation?

Ans. 43. No; I can't say that I so understood it.

Int. 44. Have you paid any of the expenses of litigation; and, if so, how much?

Ans. 44. I have paid all claims Mr. Stearns has presented to this time.

Int. 45. How much have you paid?

Ans. 45. I have paid five dollars up to the present time.

Int. 46. Who employed Mr. J. M. Woolworth?

Ans. 46. I don't know; probably Mr. Stearns.

Int. 47. Who employed D. G. Hull in this case?

Ans. 47. I answer as above to last int.

Int. 48. Who employed Mr. Seymour as att'y?

Ans. 48. I answer to same as to the others.

Int. 49. Did you give Mr. Stearns full authority to employ all the attorneys he wanted to?

Ans. 49. I left the case in Mr. Stearns' care.

Int. 50. Was there not some kind of an understanding or agreement between you and Mr. Ewing, that in case you was successful in getting the title to the property you was to convey it back to Mr. Ewing?

88 Ans. 50. No, sir; there was not. I am under no more obligations to Mr. Ewing in that respect than I am to Mr. Bullock.

Int. 51. Don't you expect to convey it back to him if you gain the case?

Ans. 51. I would convey it back to Mr. Ewing in this way; if this deed is sustained I will convey it back to Mr. Ewing if he pays a price for it that will justify me in selling it. I expect to make some money out of it, and whoever I convey it to will have to pay it, whether it is Mr. Ewing, Mr. Stearns, or Mr. Bullock.

Int. 52. How do you expect to make the money?

Ans. 52. I expect to make the money by selling it for more money than I gave or am to give.

Int. 53. Do you expect to build on it or improve it?

Ans. 53. That is something I can't answer. I don't know what time might develop. I have been solicited several times to go into partnership with Mr. Ewing since he has been out there, and the last time I told him I would take it under consideration.

Int. 54. Are you in partnership on this lot with Mr. Ewing?

Ans. 54. I am not.

Int. 55. You expected to sell the lot as soon as the title was settled, did you not?

Ans. 55. That would depend on circumstances. If I should conclude to go into partnership with Mr. Ewing and put up a building it would not be for sale.

Int. 56. Was that talked over at the time you took the deed?

Ans. 56. As Mr. Ewing went with me down to the train he said like this: It is your right and privilege to sell this property to any one you please, but I would like to have you come out and
89 go into partnership with me and put up a building on it. I told him I would take it into consideration.

Int. 57. What caused Mr. Ewing to tell you it was your right and privilege to sell that property to whom you pleased; was there anything said or done prior to that time that would convey a different idea?

Ans. 57. There was no agreement, either written or verbal, that I was under any obligation to Mr. Ewing.

Int. 58. Did not Mr. Ewing state to you in substance that he had purchased that property and that a suit had been begun in the State courts to set aside his title, and that he wanted to transfer the case to the United States court, and he could not do that unless he would transfer the property to some person living out of the State of Nebraska, and that he desired to convey it to you, so that you could bring suit in the U. S. court for possession? Did he say that, or any part of it, or any words to that effect?

Ans. 58. I understood from Mr. Ewing that the property was in litigation at the time I bought it; as to his saying he wanted me to buy it and throw it into U. S. court, I have no recollection of that.

Int. 59. Will you state that he did not say that or words to that effect?

Ans. 59. I will state that my best recollection is that he did not.

Int. 60. Was it not the sole purpose of conveying that property to you that the litigation might be transferred from the State to the Federal courts?

Ans. 60. My purpose was to get it into a court where I could get possession of the property I bought or know I could not get possession.

90 Int. 61. What was said about that between you and Ewing at that time, or any other time?

Ans. 61. I answer the same as I have before—that there was no such obligation between myself and Ewing.

Int. 62. State fully all the conversation or conversations that ever at any time took place between you and Mr. Ewing in relation to the purchase and transfer of the property in question.

Ans. 62. I believe I have given all the conversation we had about the property that I recollect of. He wanted to sell me the property, and left the impression with me that there was money in it to me, provided I could succeed in holding the title.

Int. 63. What did he say was the reason he desired to sell it?

Ans. 63. About all he said to me was that it was in litigation and the title could be easier got by some one else than himself, and he would rather see me make some money out of it than any one else he knew.

Int. 64. What did he say was the reason that some other person could get the title easier than he could?

Ans. 64. I don't recollect that he gave any reason; I don't believe he did.

Int. 65. Did you not understand the reason to be that the title could be more easily obtained in the Federal courts than in the State courts?

Ans. 65. My understanding was that if the suit was brought by me that it could be more easily arranged—that is, it could be disposed of quicker.

Int. 66. Why could it?

Ans. 66. My understanding was that if I brought suit it would be tried in the Federal court.

91 Int. 67. Then you purchased it for the purpose of bringing suit in the Federal court, did you?

Ans. 67. I bought it with the intention of bringing suit in that or any other court that would guaranty me a title.

Int. 68. Did not Mr. Ewing or the att'y give you to understand that Mr. Ewing could not maintain his title in the State courts?

Ans. 68. That is not my recollection—that there was anything of that kind said to me.

Int. 69. What did you understand to be the reason that Ewing could not maintain his title as easily as you could?

Ans. 69. I don't recollect of Ewing assigning any reason to me.

Int. 70. Did any person?

Ans. 70. Mr. Stearns said to me, in substance, that if I bought this property that the title could be easier maintained in me than it could in Mr. Ewing.

Int. 71. What reason did he give?

Ans. 71. The reasons were, me being a non-resident, that there was no question as regards the title, but *what* I would get it.

Int. 72. Why did he say a non-resident could get the title easier than a resident?

Ans. 72. Simply because it would be tried in that court.

Int. 73. In what court?

Ans. 73. In the Federal court.

Int. 74. Was Mr. Ewing present during that conversation?

Ans. 74. I could not say whether he was or not; we were in Mr. Stearns' office quite awhile together; on reconsideration I will say that he was not present.

Int. 75. Was not that the inducement held out to you to
92 purchase?

Ans. 75. My object in purchasing was that if I got the property I was making a good investment, and if I could get title in a Federal court or any other court I wanted it.

Int. 76. Was not that part of the inducement for you to take the conveyance, so the action could be brought in the Federal court?

Ans. 76. The inducement on my part was this: that it did not make any difference what court it was brought in, so my warranty was guaranteed to me in the title to the property.

Int. 77. Was it not understood before you took the deed that you was to seek immediately in the Federal court?

Ans. 77. That is not my recollection.

Int. 78. Will you say that is not so?

Ans. 78. No; that is not so.

Int. 79. How much is that property worth?

Ans. 79. I don't know that I could approximate to the real value of the property. I suppose if it had a good clear title it would be worth from eight to ten thousand dollars.

Int. 80. Did you make any inquiry as regards its value before you bought?

Ans. 80. No. I made no special inquiry, but judging from the price of lots in smaller places where I was acquainted I thought it was a very safe investment.

Int. 81. If you are defeated in the title is Ewing to pay the costs and attorney's fees in the case?

Ans. 81. As Ewing sold me that property and gave me a warranty deed for it, I expect him to make it good.

93 Int. 82. Was there not some understanding between you and Mr. Ewing that he was to pay attorney's fees?

Ans. 82. I believe I have answered that question once, and will answer this one similar—that I have paid all claims Mr. Stearns has presented.

Int. 83. The question was [was] there any understanding that Mr. Ewing was to pay attorney's fees?

Ans. 83. I have answered, but will say again there was no such understanding.

Int. 84. Don't you know it to be a fact that Mr. Ewing is paying attorney's fees?

Ans. 84. I do not.

Int. 85. How many letters have you ever received from Mr. Stearns since July last?

Ans. 85. I believe only one.

Int. 86. When was that?

Ans. 86. Am not able to give the date.

Int. 87. About how long ago was it?

Ans. 87. It was some time after I came home from there, possibly two or three weeks or longer; I can't say as to the time exactly.

Int. 88. Was that the time you got the note?

Ans. 88. No, sir.

Int. 89. How many letters have you written to Mr. Stearns?

Ans. 89. I can't say whether I ever wrote him one; I think not, though.

Int. 90. How long was you in Lincoln at the time you made this purchase?

Ans. 90. I was there from Saturday till Monday.

Int. 91. Where did you next see Mr. Stearns?

Ans. 91. I next saw Mr. Stearns to-day.

Int. 92. What day of the week was the deed made to you?

94 Ans. 92. On Monday, I believe.

Int. 93. Did you go out to Lincoln on purpose to buy this property?

Ans. 93. I answered that once before, but will say I did not, for I had not seen the property at that time.

Int. 94. Did you have that in view?

Ans. 94. I will state that that was under contemplation, but I hardly ever buy anything until I see it.

Int. 95. How long prior to the time you went to Lincoln had you heard from Mr. Ewing?

Ans. 95. My recollection is it was 2 or 3 months prior to that time.

Int. 96. Aside from your farm, farm implements, and stock what property was you worth in July, 1882?

Ans. 96. I suppose about five or six hundred dollars. I have not taken a close inventory.

Int. 97. Did you sell any property between the time you took this deed and the time you sent that money?

Ans. 97. Yes; about a hundred dollars' worth.

Int. 98. Where did you get the thousand dollars you sent to Nebraska?

Ans. 98. I got it from the Farmers' and Traders' Bank in Leon, Iowa.

Int. 99. Did you borrow it?

Ans. 99. I did.

Int. 100. Have you paid it?

Ans. 100. It is not due, and I have not paid.

Int. 101. Is there not some understanding between you and Mr. Ewing that he is to furnish the money to pay that note of yours in the bank?

Ans. 101. There is not.

Int. 102. How many other notes are due to Mr. Ewing?

Ans. 102. There is two.

Int. 103. When do they come due?

95 Ans. 103. I believe one was for 90 days, and the other for six months—am not positive.

Int. 104. Was one note for one thousand and the other for four thousand?

Ans. 104. There was no four-thousand note given.

Int. 105. How many notes were there?

Ans. 105. There were three in all.

Int. 106. Will you make search for all letters received by you from Mr. Ewing or any other person in relation to this controversy, and bring in all such letters & papers, including the note or telegrams, that they may be made a part of your deposition?

Ans. 106. I will, if I can find them.

Not being able to complete the taking of these depositions to-day, by reason of want of time to complete the same, I here adjourn the further taking of the same until to-morrow, November 4th, 1882, then to be continued at my office between the hours of 8 o'clock a. m. and 6 o'clock p. m. of said day.

[SEAL.] S. A. GATES,
Notary Public.

Now, on this 4th day of November, 1882, at 8 o'clock a. m., in pursuance of the above adjourned, I continued the further taking of these depositions as follows, to wit:

JOHN W. KEELER further deposes as follows, on direct examination, to wit:

Int. 107. Have you made diligent search for letters and papers; if so, what did you find?

Ans. 107. I did; I found one letter.

Int. 108. Where is it?

Ans. 108. I have it.

Int. 109. Will you let me read it to see if I want it?

Ans. 109. I will. (Att'y here reads letter.)

96 Int. 110. Did you find the note?

Ans. 110. I did.

Int. 111. Have you got it with you?

Ans. 111. I have.

Int. 112. Will you hand it to notary and let him copy it?

Ans. 112. Yes; here is the note with my name torn off.

Copy of Note.

$1,000.00. LEON, IOWA, *July 17th*, 1882.

Thirty days after date I promise to pay to the order of Thomas Ewing one thousand ($1,000.00) dollars at Lincoln, Nebraska, value received, int. at the rate of 6 per cent.

No. —. Due ——. J—.

Int. 113. How much was the second note, and how long did it run?

Ans. 113. I believe I stated before that my recollection was it was due in 90 days; it was for two thousand dollars.

Int. 114. How much was the third note, and how long did it run?

Ans. 114. It was for same amount, $2,000.00, and my recollection is it run six months.

Int. 115. What arrangements have you made for meeting the second note?

Ans. 115. I have no particular arrangement, but when the note is presented for payment I then will make arrangements and pay it.

Int. 116. Was or is it not understood that you was not to pay any more until the suit was decided?

Ans. 116. I consider these notes just the same as all other notes I have given. When they become due and are presented I expect to pay them as I do all others. I would say no; there was no such agreement.

97 Int. 117. What relationship exists between you and T. Ewing?

Ans. 117. T. Ewing is a half brother to my wife.

Int. 118. You were formerly in partnership, were you not?

Ans. 118. Yes, sir.

Int. 119. You expect to go into partnership again do you not?

Ans. 119. I said yesterday that it was under contemplation; that I was studying about it.

On cross-examination witness said:

Int. 1. Mr. Keeler, to refresh your memory I will ask you if the 2nd & 3rd notes were not by their terms to come due in 6 months and a year instead of 3 & 6 months?

Ans. 1. My impression is just what I said yesterday.

J. W. KEELER.

Subscribed in my presence and sworn to before me by said J. W. Keeler, this 4th day of November, 1882.

S. A. GATES,
Notary Public.

"L."

Know all men by these presents that John W. Keeler and R. L. Keeler, husband and wife, of Decatur county, State of Iowa, in consideration of the sum of five thousand ($5,000.00) dollars in hand paid, do hereby sell and convey unto Thomas Ewing, of Lancaster county, and State of Nebraska, the following-described premises, situated in Lancaster county, and State of Nebraska, to wit: Lot numbered nine (9), in block numbered fifty-six (56), in the city of Lincoln, according to original plat, the intention being to convey hereby an absolute title in fee-simple, including all the rights of homestead, to have and to hold the premises above described with all the appurtenances thereunto belonging unto said Thomas Ewing and his heirs and assigns forever, provided, always, and these pres-

ents are upon the express condition that if the said John W.
98 Keeler, his heirs, executors, or administrators shall pay or cause to be paid to the said Thomas Ewing, his heirs, executors, administrators, or assigns the sum of five thousand ($5,000.00) [dollars.]

$1,000.00 *dollars* on the 16th day of August, 1882.
$2,000.00 *dollars* on the 17th day of Jan'y, 1883.
$2,000.00 *dollars* on the 17th day of July, 1883.

With the interest thereon at the rate of 6 per cent. according to the tenor and effect of the three certain promissory notes of said John W. Keeler, bearing even date with these presents, then these presents to be void; otherwise to be and remain in full force.

Signed the 17th day of July, A. D. 1882.

JOHN W. KEELER.
R. L. KEELER.

In presence of—
S. A. GATES.

THE STATE OF IOWA, } ss:
Decatur County, }

On this 24th day of July, A. D. 1882, before me, S. A. Gates, a notary public in and for said county, personally came John W. Keeler and R. L. Keeler, his wife, personally to me known to be the identical persons whose names are affixed to the above deed as grantors, and acknowled the execution of the same to be their voluntary act and deed.

Witness my hand and notarial seal.

[N. P. SEAL.]

S. A. GATES,
Notary Public.

THE STATE OF NEBRASKA, } ss:
Lancaster County, }

I, J. H. McClay, county clerk of said county, hereby certify that the above and foregoing is a true and correct copy of a real estate m'tg'e, as appears of record in this office in M'tg'e Record Y, at page 175.

In testimony whereof I have hereunto set my hand and
99 affixed the seal of said county, at the city of Lincoln, this 29th day of January, A. D. 1884.

[SEAL.]

J. H. McCLAY,
County Clerk.

Endorsed: (Have this deed recorded.) Mortgage deed. John W. Keeler and wife to Thomas Ewing.

STATE OF NEBRASKA, } ss:
Lancaster County, }

Entered on numerical index and filed for record in the clerk's office of said county, the 29th day of Nov., 1882, at 2 o'clock and 35 minutes p. m., and recorded in Book Y of Mortgages, on page 175.

J. H. McCLAY,
County Clerk.

"M."

Petition.

State of Nebraska, in District Court in and for Lancaster County.

MILTON F. LAMASTER, Plaintiff, *vs.* THOMAS EWING, Defendant.

The plaintiff complains of the defendant and for his cause of action states as follows:

1. That he has the legal title to and by his tenants has the actual possession of the following-described real estate, to wit: Lot nine (9), in block fifty-six (56), in the city of Lincoln, in Lancaster county, in the State of Nebraska, on which are valuable buildings and which produce large sums by way of rent.

2. That the defendant, Thomas Ewing, claims title to the said real estate under and by virtue of an instrument purporting to be a deed of conveyance of the said premises, executed by Ellis L. Bierbower, as United States marshal of the district of Nebraska, to the said defendant, bearing date on or about the 9th day of May, A. D. 1882, hereinafter mentioned; and the said defendant claims a right by virtue of the said instrument to the immediate possession of the said premises, and further threatens to commence, and,
100 as plaintiff is informed and believes and he so alleges, is about to commence, proceedings, under the statute of Nebraska, in respect to unlawful and forcible entry and detention of property for the purpose of obtaining the possession of said real estate by reason and force of holding such alleged conveyance; to that end the said defendant has caused notice to be served upon the occupants of said premises, and upon others alleged or supposed to claim an interest therein, requiring them to quit and deliver possession thereof to the defendant, and the plaintiff has reason to, and does, believe and he alleges that the defendant is about to and will commence such proceedings immediately unless enjoined from so doing.

3. The plaintiff further shows that the said instrument is in fact void and ineffectual to convey to the defendant any title to or interest in the said premises, and that the grounds and pretense upon which the same has been executed were as follows: On or about the — day of ———, A. D. 1875, at the November term of that year of the circuit court of the United States for the district of Nebraska, Charles W. Seymour and William W. Wardell recovered a judgment against William P. Young and no other person, in an action then and there pending between said parties and no others, for the sum of seventy-five hundred dollars ($7,500.00) damages, and costs, to be taxed, and shortly thereafter, to wit, on or about the 2d day of December, A. D. 1875, there was filed in said cause, in the office of the clerk of said court, an instrument purporting to be a bond for the stay of execution upon said judgment, and to be signed by John Irwin, Jane F. Irwin, W. T. Donovan, Nathan F. Moffitt, and Milton F. Lamaster, and wherein it was set forth that the signers acknowledged themselves security for the defendant in said action for pay-

ment of the judgment aforesaid and interest and costs from
101 the time of rendering said judgment until paid, to be paid in nine months from the rendering of the same, and the said instrument purported to be approved by the clerk of said court.

4. The plaintiff had signed said instrument and signed and verified a justification thereon endorsed as to his sufficiency as a surety while the same was in the hands of said John Irwin, as agent of William P. Young, but on the express condition that before the same should be filed or used as a stay bond certain other persons should execute the same; and afterwards, before the same was filed or such condition had been complied with, this plaintiff went to said Irwin and required that his name should be erased from said instrument, and he withdrew therefrom; and it was expressly agreed between them that the plaintiff did so withdraw, and that he would not be a surety thereon; and he erased and cancelled his nane thereon, intending and supposing he was erasing and cancelling it where it was affixed to the body of the instrument; but by mistake and inadvertence, as he afterwards and after the filing of said instrument ascertained, the signature which was so erased and cancelled was the signature of the verification as surety, instead of that to the bond or instrument; and in that condition the same was presented to and filed by the clerk of the court. And plaintiff alleges that by reason of the facts and the absence of such verification the plaintiff's signature was not regarded by the clerk, and the bond or instrument was not approved by him in any degree by reason thereof, and plaintiff's signature had no influence to move such approval. Wherefore plaintiff alleges that he did not execute the said instrument, and that as to him it had no force or effect.

5. At that time there was not, nor was there for more than
102 one year thereafter, any rule or order of the said circuit court adopting as rules of procedure therein, or giving any force or effect to the laws of the State of Nebraska then in force regulating the issuing of executions and the proceedings to be had thereon to enforce the collection of judgments in the said court, and especially the act of the Legislature of this State entitled "An act to provide for stay of execution and orders of sale," approved February 23d, 1875, had then no force or effect in the said court, or as to judgments or executions therein, and as plaintiff is advised and alleges it has never had any force or effect as to judgments rendered therein or executions issued therefrom.

6. At the time when said instrument was filed the plaintiff had the legal title to the real estate above described, and was in possession thereof. Afterwards he conveyed the same to one Foster, and through conveyances from said Foster and his assigns the plaintiff again obtained and received a conveyance of the legal title of said real estate, and had held the same since on or about the 20th day of July, A. D. 1880, and is now the absolute owner of and possessed of the legal title thereto.

7. On or about the 14th day of April, A. D. 1881, there was issued out of and under the seal of said court by the clerk thereof an *alias* execution upon the said judgment, which recited that there re-

mained due thereon the sum of $4,744.31 on the 20th day of April, A. D. 1881, which execution was directed to the marshal of the district of Nebraska, and commanded him to levy of the goods and chattels, lands, and tenements of the said William P. Young, debtor, and John Irwin, J. L. Irwin, W. L. Donovan, Milton F. Lamaster, and Nathan T. Moffitt, sureties, the sum last aforesaid due on said judgment, and thereupon said marshal levied the same on the real estate aforesaid, to wit: On lot nine (9), in block fifty-six (56)
103 aforesaid, as the property of this plaintiff, and proceeded to appraise the same, and gave notice that he would sell the same, and did, on the 17th day of May, A. D. 1881, at the United States court-house in Omaha, in this State, undertake and purport to sell by virtue of the execution aforesaid, and not otherwise, to the defendant, Thomas Ewing, the interest of the plaintiff therein. Thereupon said marshal reported to said court the sale aforesaid and his proceedings touching the same, and such proceedings were had in the premises that thereafter, on or about the — day of —, 1881, the said court made an order purporting to confirm the said sale and the proceedings thereunder, and that the marshal should execute to said purchaser a deed to the premises so sold.

8. Afterwards, to wit, on or about the 9th day of May, A. D. 1882, Ellis L. Bierbower, the marshal, executed to the defendant an instrument purporting to be a conveyance of the premises aforesaid, therein reciting the judgment and execution aforesaid, and delivered the same to the defendant, as the plaintiff is informed and believes, and therefore alleges, under which, and not otherwise, the defendant claims title thereto.

9. The plaintiff further shows that the plaintiff in the aforesaid action, Charles W. Seymour, and William W. Wardell were at the commencement thereof, and ever since have been, citizens of the State of Nebraska, and this plaintiff then was, and ever since has been, a citizen of the same State; that he was not a party to the said action, or in any manner concerned therein, and that his alleged signature to the said stay bond was the only ground or pretense for the inserting of his name in the said execution, and he is advised and alleges that the said circuit court had not, nor had the clerk thereof, jurisdiction to issue the same, and that all and singular the proceedings aforesaid were without jurisdiction, and null and
104 void as to this plaintiff and his property, and did not divest or affect his title thereto, save to cloud the same, by the alleged conveyance thereof to the defendant, which, upon its face and by reasons of its recitals, would be, as plaintiff is advised and fears, *prima facie* evidence of title in the defendant.

10. The plaintiff is advised and alleges that by reason of the limited jurisdiction of any court in which proceedings of forcible entry and detention, or forcible detention, can be commenced and prosecuted, it will not be competent for such court to hear and determine the matters herein alleged for the avoiding of the instrument aforesaid, and the plaintiff will be imperiled of being evicted from and dispossessed of said premises by such proceedings to his great prejudice, and plaintiff further shows that the said instrument

creates and is a cloud upon the plaintiff's title to said premises to his great prejudice.

Plaintiff demands judgment that the title to said premises be quieted in the plaintiff, and the said conveyance to the defendant be adjudged to be null and void; that the defendant and his several agents and attorneys be enjoined from commencing or prosecuting any action or actions to obtain possession of the said premises, or to recover the same, or in any manner to disturb the possession of the plaintiff or his tenant or tenants thereof during the pendency of this action, and that on trial thereof such injunction be made perpetual.

That the defendant be enjoined from conveying, incumbering, taking possession of, or in any manner meddling with the said premises during the pendency of this action, and that on the trial thereof such injunction be made perpetual; and that the plaintiff have such further or other relief as he may be entitled to.

E. WAKELEY,
Att'y for Pl'ff.

105 STATE OF NEBRASKA, } *ss:*
Lancaster County, }

Milton F. Lamaster, the plaintiff, being duly sworn, says: That he believes the facts stated in the foregoing petition to be true, and so far as they are within his own knowledge the same are true.

MILTON F. LAMASTER.

Sworn to before and signed in my presence, this 23rd day of May, A. D. 1882.

A. D. BURR,
Cl'k D. C.

Endorsed: State of Nebraska, Lancaster county, *ss:* On reading the foregoing petition and upon motion of said plaintiff's attorney it is ordered that a temporary injunction issue as prayed for upon the plaintiff executing to defendant an undertaking in the sum of $400, with sureties to be approved by the clerk of district court of Lancaster county, and conditioned as required by law. May 23, 1882. S. B. Pound, judge. State of Nebraska. In district court, Lancaster county. Milton F. Lamaster *vs.* Thomas Ewing. Petition. Filed May 23, 1882. A. D .Burr, clerk dist. court.

Answer.

"N."

In the District Court, Lancaster County.

MILTON F. LAMASTER *vs.* THOMAS EWING.

Now comes the defendant and for answer says:

I. He denies that the said plaintiff has the legal title to the premises in his petition described, or that said defendant ever threatened or intended to commence proceedings under the statute of Nebraska

in respect to unlawful and forcibly entry or detention of property, or that the instrument by virtue thereof said defendant claims and is seized of said premises is void or ineffectual to convey to
106 him any title to or interest in said premises, or that any or either of the matters and things stated and set forth in the fourth paragraph of said petition are true, either in substance or effect, or that there was no rule of the United States circuit court for the district of Nebraska adopting or giving effect to the laws of this State regulating the issuing of executions and proceedings to be had thereon to enforce the collections of judgments in said court, or the act in the fifth paragraph of said petition entitled, or that said act has no force or effect in said court or as to judgments or executions therein, or that the said Foster in said petition mentioned, either directly or by mesne conveyances, ever conveyed said premises to said plaintiff, or that said plaintiff is, or at the commencement of this action was, the absolute owner of or possessed of the legal title to said premises, or that said plaintiff was not a party to or concerned in the action mentioned in the ninth paragraph of said petition, or that said circuit court or its clerk had not jurisdiction to issue the execution in said paragraph referred to, or that all or any or either of the proceedings, actions, or doings of said court or of its clerk mentioned or referred to in said petition were without jurisdiction or null and void as to said plaintiff or his property, or did not divest or affect his title thereto, or that the said plaintiff is, or ever was or by law can be, in any the least danger of being evicted from or dispossessed of said premises by any proceedings in forcible entry and detainer, or that thereby he can be in anywise or degree prejudiced, or that the said conveyance to this defendant creates or is a cloud upon the said plaintiff's title to said premises.

II. This defendant, further answering, says that on the 25th of November, 1875, a bond or undertaking was filed in the said United States circuit court for the district of Nebraska, and
107 in the action in said petition mentioned signed by John Irwin, Jane Y. Irwin, W. T. Donovan, Milton F. Lamaster, who is the plaintiff in this action, and Nathan F. Moffitt, which bond was in the form and upon the conditions in all respects required by the laws of this State in order to stay the issue of execution on judgments, and to the said bond remaining on file in said circuit court this defendant prays leave to refer should it be necessary to do so. Thereupon the said clerk took and approved the sureties thereon, including said plaintiff, and recorded said bond in a book kept in his office for the purpose. Whereupon the said bond and the record thereof became and was and had the force and effect of a judgment confessed by and against said sureties, and among them said plaintiff, from the date of said judgment and against the property of said sureties, and the said clerk of said court entered and indexed the same in the proper judgment docket of said court as in the case of other judgments, of all which the said plaintiff then and there had full knowledge. In consequence of the said bond and of the name of said plaintiff thereon, and his obligation and undertaking therein as aforesaid, the said defendant Young had and obtained stay of

execution on the said judgment againt him, nor to the plaintiffs in said judgment or the clerk of said court, or any other party interested or becoming interested, did the said plaintiff give any notice of all or any of the several matters or things by him in his said petition alleged in order to invalidate said bond or his obligation thereon.

III. On the 5th of May, 1881, and after the sale of the United States marshal for the district of Nebraska of the premises described in said petition upon the said execution against said plaintiff, a motion was made and filed in said court by and on behalf of the
108 plaintiff in said judgment that said sale be confirmed, and upon the same, on the 20th of May, 1881, the said court made an order that by a day therein in that behalf limited all parties interested therein show cause, if any they have, why said sale should not be confirmed. On the 27th of May, 1881, the said plaintiff appeared in said court and filed his motion to set the said sale aside, and in support of that his said motion he filed his affidavit, wherein under his oath he set forth and alleged all and every the matters and things which he has set forth and alleged in his said petition, in order to show that he withdrew from and was not a party to nor bound by the said stay bond, and therefore that no judgment ought to or could have been entered or execution issued against him; and the said plaintiff then and there further alleged to said court as grounds for setting aside the sale and refusing to confirm the same the following:

That the said instrument purporting to be a surety bond was not his bond, act, or deed for the reasons set forth in his said affidavit.

That he did not justify as to his sufficiency or as such alleged surety or make affidavit as such, as required by law.

That he was not approved as such surety, as required by law.

That the said court had not jurisdiction to issue said execution against the property of said Lamaster or render any judgment against him, or entertain or take any proceedings against him or his property, as such alleged surety.

That the said sale had been enjoined by due proceedings therefor. That the said notice of sale was insufficient, and was not given in such manner or published for such time as is by law required in that behalf.

That there was no judgment upon which said execution could lawfully be issued. That there was no law or rule of the said
109 court authorizing the issuing of said execution against the said Lamaster, as surety.

On the 14th of June, 1881, the said plaintiff on his part and the said Seymour and Wardell on their part submitted the said motion to the said court for the consideration of the judges thereof, and in support of his said allegations why the said sale should be set aside and not confirmed said plaintiff filed an elaborate printed argument made by eminent counsel of the bar of said court, wherein he insisted upon all and every the matters and things alleged by him in his said petition, all of which the judges of said court duly considered, and upon such their consideration thereof on the first of September, 1881,

the said court found that no cause had been shown why said sale should not be confirmed, and entered its order in due form of law confirming said sale and directing the marshal aforesaid to make to this defendant his deed conveying said premises to him, which he accordingly did; and the deed by the said plaintiff in his petition complained of is the same deed made by said marshal under and in pursuance of the order of said court. Wherefore this defendant now here submits that all and every the matters and things by the said plaintiff complained of have been duly and fully adjudged and determined by the said circuit court, then and there having jurisdiction of the said matters and of the parties thereto, nor ought he to be permitted to again agitate the same or in any way call them in question.

IV. When the said premises were offered for sale by the said marshal under said execution the said plaintiff, by his agent, bid for the same, nor did he then, or at any time until the motion to confirm said sale, state to any person interested in the matter that he was not obliged by said bond. On the 21st of January, 1882, the said plaintiff filed in said circuit court his bill of exceptions, duly
110 allowed and signed by the judge of said circuit court, wherein he set forth the proceedings of said court upon the said motion to confirm said sale, and the said marshal having brought the proceeds of said sale into said court and deposited the same with the clerk thereof, on the 28th of January, 1882, the said court, by its order duly made, directed the said clerk to pay the same to the plaintiffs in said judgment, which was accordingly done before the said deed of the said marshal to this defendant was made.

V. This defendant did intend to bring his action in ejectment for the recovery of the possession of said premises from the parties withholding the same from him prior to the commencement of this action, and now here insists that he ought not to be enjoined by this court, sitting as a court of equity, from doing so, but ought to be left to his remedy in due course of law to prosecute his rights to the said premises. And this defendant now here submits that this court is without jurisdiction of all or any of the matters alleged in said petition to grant the relief therein prayed.

VI. And this defendant says that C. W. Foster is the real party in interest in this action, and that he ought to be made a party hereto, and without his presence the questions herein cannot be finally determined.

Wherefore this defendant prays:

1. That the injunction heretofore allowed by the judge of this court as prayed for in said petition be dissolved.

2. That this action on the part of the plaintiff be dismissed.

3. That the said plaintiff, his tenants, and agents be decreed to surrender and deliver possession of said premises to this defendant, and admit this defendant to the possession of said premises.

4. That a receiver be appointed to take, receive, and collect the rents of said premises.

111 5. That an account be taken of the rents of said premises which have accrued since the said defendant demanded

possession of said premises, and the said plaintiff be adjudged to pay the same with interest.

6. That the said C. W. Foster be impleaded in this action as a party plaintiff or defendant, as he may elect.

7. That this defendant have his costs of this action and all other relief that is necessary and equitable.

J. M. WOOLWORTH,
D. G. HULL, AND R. D. STEARNS,
Def'ts' Att'ys.

STATE OF NEBRASKA, } ss:
Lancaster County, }

Thomas Ewing, being duly sworn, says he is the defendant in the above answer, and that the facts stated therein are true of his own knowledge, except as to the matters stated therein on information and belief, and as to those matters he believes it to be true.

THOMAS EWING.

Subscribed in my presence and sworn to before me, this 19th day of June, 1882.

A. D. BURR, *Clerk D. C.*

Endorsed: District court, Lancaster county. Milton F. Lamaster *vs.* Thomas Ewing. Answer. Filed June 19, 1882. A. D. Burr, clerk D. C.

"O."

State of Nebraska. In District Court for Lancaster County.

MILTON F. LAMASTER, Plaintiff, *vs.* THOMAS EWING, Defendant.

The plaintiff for reply to the answer in this action states as follows:

He denies the following allegations of said answer, to wit, that the instrument therein alleged to have been signed by this plaintiff was his bond, or binding on him.

112 That the clerk approved this plaintiff as a surety or regarded him as legally or properly a surety therein.

That said alleged bond or the record thereof became or was or had the force and effect of a judgment confessed by or against said sureties.

That the plaintiff had knowledge of the alleged entering or indexing of said alleged judgment.

That said Young had stay of execution on said judgment in consequence of plaintiff's name on said instrument, and alleges if he did that he was not entitled thereto.

That plaintiff did not give notice of the matters and things in his petition alleged in order to invalidate said alleged bond or obligation.

He denies that said judges considered or deemed it material to consider all the matters in said motion of this plaintiff set forth for the setting aside of said sale.

That the matters and things by this plaintiff complained of have been duly or fully adjudged and determined.

That said court had jurisdiction to adjudge or determine any matter or thing in the premises except as to the regularity and formalities of the proceedings in and about the alleged sale.

That the plaintiff bid for the said premises at said alleged sale.

That he did not then or before the motion to confirm the sale state to any person interested in the matter that he was not obliged by said bond.

That this court is without jurisdiction to fully determine all matters in controversy herein.

That C. W. Foster is the real party in interest in this action or has any title to the premises in controversy.

Further replying, the plaintiff says that the affidavit by him filed on the motion to set aside said sale was by the court, on motion, stricken out, and was by the court disregarded.

113 He is advised and alleges that said Ewing bid at said sale with knowledge and was chargeable with knowledge of the matters by this plaintiff alleged to invalidate the same, and that he is indemnified by certain bonds given by order of the court wholly or to a large extent on account of the money by him paid thereon.

As to all and singular the papers and records by said answer pleaded, the plaintiff does not know that they are correctly stated, and prays leave to refer to the same for greater accuracy.

And he denies all and singular the allegations of said answer which are contradictory of or inconsistent with the allegations of the petition.

E. WAKELEY AND
MASON & WHEDON,
Att'ys for Pl'ff.

STATE OF NEBRASKA, } ss:
Douglas County, }

E. Wakeley, attorney of said plaintiff, being duly sworn, says: That he believes the facts stated in the foregoing reply to be true. The reason the plaintiff does not verify the same is that he is not a resident of Lancaster or of Douglas county and affiant believes he is absent therefrom.

E. WAKELEY.

Sworn to before me and signed in my presence, this 7th day of July, 1882.

[SEAL.] CHARLES P. EDWARDS,
Notary Public.

Endorsed: State of Nebraska, Lancaster county district court. M. F. Lamaster *vs.* Thomas Ewing. Reply. Filed July 8, 1882. A. D. Burr, clerk D. C.

"P."

In the District Court, Lancaster County.

MILTON F. LAMASTER vs. THOMAS EWING.

114 This cause came on to be heard before the undersigned judge, at his chambers, on the 6th of July, 1882, upon the defendant's motion to dissolve or modify the injunction heretofore allowed therein, and was argued by J. M. Woolworth, of counsel for the defendant, in support of the motion, and by E. Wakeley, of counsel for the plaintiff, in opposition thereto. And thereupon the said judge took time to consider of the same. And now here it is ordered that the said injunction be, and the same is hereby, modified as follows: The clauses of the order of injunction, so far as they restrain the defendant from bringing and prosecuting any action or actions in ejectment for the recovery of the possession of said premises in the petition described, and from conveying or encumbering the same, are vacated and discharged; but the clause restraining the defendant from bringing or prosecuting any proceedings for the forcible entry or detention of said premises is retained in full force as under the original order for said injunction, for which the bond heretofore taken by the clerk shall stand as security.

Dated July 8th, 1882.

S. P. POUND, *Judge.*

(Entered in court journal "H," page 620.)

STATE OF NEBRASKA, } ss:
Lancaster County, }

I, E. R. Sizer, clerk of the district court of 2nd judicial district of Nebraska, in and for said county, do hereby certify that the above are true and correct copies of the petition, answer, and reply, with all the endorsements thereon, and the order of the judge of said court modifying the injunction, all in a cause in said court, in which Milton F. Lamaster is plaintiff and Thomas Ewing is defendant, as the same appears from the records and files of said court in my charge as such clerk.

115 Witness my hand and the seal of said court this 6th day of March, 1884.

[SEAL.]

E. R. SIZER,
Clerk D. C.
By J. S. DALES, *Dep.*

$6.00

And the said defendant thereupon presented the stipulation hereto attached and prayed that this bill of exceptions might be allowed and signed as provided for by said stipulation, which is accordingly done, and upon his motion ordered to be made a party of the record in this case.

Done in open court this 28th day of March, 1884.

This bill of exceptions was originally presented to me in open

court for signing on the 28th March, 1884, but has since been changed and, in some respects, corrected, and is now, on this 14th day of April, 1884, signed by—

ELMER S. DUNDY, *Judge.*

Upon the back of said bill of exception appear endorsements in words and figures following, to wit: No. 245—F. U. S. circuit court, district of Nebraska. John W. Keeler *vs.* Milton F. Lamaster. Bill of exceptions. Filed April 14, 1884. Elmer D. Frank, clerk.

Thereupon afterwards, to wit, on the 19th day of April, 1884, a bond was filed in said case, which said bond is in the words and figures following, to wit:

116 Know all men by these presents that we, Milton F. Lamaster, as principal, and Robert E. Moore and George P. Tucker, both of Lincoln, Nebraska, as sureties, are held and firmly bound unto John W. Keeler in the full and just sum of twenty-five hundred dollars, to be paid to said John W. Keeler, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 17th day of April, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas lately, at the circuit court of the United States for the district of Nebraska, in a suit depending in said court between John W. Keeler, plaintiff, and Milton F. Lamaster, defendant, judgment was rendered against the said Milton F. Lamaster, and the said Milton F. Lamaster having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said John W. Keeler citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Milton F. Lamaster shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else, to remain in full force and virtue.

MILTON F. LAMASTER.
ROBERT E. MOORE.
GEO. P. TUCKER.

Signed in the presence of—
CHAS. H. MOORE.

Approved by—
ELMER S. DUNDY, *Judge.*

117 Upon the back of said bond appear endorsements in words and figures following, to wit: No. 245—F. United States circuit court, district of Nebraska. John W. Keeler *vs.* Milton F. Lamaster. Bond. Filed Apr. 19, 1884. Elmer D. Frank, clerk.

And also, on said 19th day of April, 1884, a writ of error was allowed and citation issued in said case, of which said writ of error and citation the following are the originals:

118 UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said circuit court before you, between John W. Keeler, plaintiff, and Milton F. Lamaster, defendant, a manifest error hath happened to the great damage of the said defendant in the said cause, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2d Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States shall be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, at Omaha, in said district, this 19th day of April, 1884.

ELMER D. FRANK, *Clerk.*

Allowed by—
ELMER S. DUNDY, *Judge.*

[Endorsed:] No. —. United States circuit court, district of Nebraska. Milton F. Lamaster, pl'ff in error, *vs.* John W. Keeler, def't in error. Writ of error. Filed Apr. 19, 1884. Elmer D. Frank, clerk.

119 THE UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

To John W. Keeler, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 2d Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein Milton F. Lamaster is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the

Supreme Court of the United States, at Omaha, this 19th day of April, 1884.

ELMER S. DUNDY, *Judge.*

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the 22nd day of May, 1884, I received this citation, and on the 24th day of May, 1884, I served the same upon J. M. Woolworth, attorney of record in the case, in Douglas county, State and District of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the endorsements thereon.

ELLIS L. BIERBOWER,
United States Marshal for the District of Nebraska,
By R. E. ALLEN,
Deputy United States Marshal.

Marshal's costs, $—.

[Endorsed:] No. —. United States circuit court, district of Nebraska. Milton F. Lamaster, Pl'ff in Error, *vs.* John W. Keeler, def't in error. Citation. Filed Apr. 19, 1884. Elmer D. Frank, clerk. Marshal's costs: Service, 2.00; copy, .30: mileage, .06. Total, $2.36.

120 UNITED STATES OF AMERICA, } *ss:*
District of Nebraska, }

By virtue of the foregoing writ of error, and in obedience thereto, I, Elmer D. Frank, clerk of the circuit court of the United States for the District of Nebraska, in the eighth circuit, do hereby certify that the foregoing folios, from one to 119, contain true and faithful transcripts of all pleadings, process, and proceedings of record and on file in my office as said clerk, in the case of John W. Keeler *vs.* Milton F. Lamaster, and that a copy of the writ of error and citation has been lodged and remains in my said office.

Witness my hand and the seal of said court at Omaha, this 2nd day of June, 1884.

[Seal United States Circuit Court, District of Nebraska.]

ELMER D. FRANK, *Clerk.*

121 Supreme Court of the United States, of October Term, A. D. 1884.

MILTON F. LAMASTER, Plaintiff in Error.
vs.
JOHN W. KEELER, Defendant in Error.

Afterwards, to wit, on the 13th day of October, in said term, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, comes the said Milton F. Lamaster, by William C. Goude and George W. Doane, his attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

I. That the said circuit court erred in setting aside the findings and special verdict of the jury returned into said court on the 13th day of December, A. D. 1883.

II. That the said circuit court erred in not dismissing this case out of said court upon the return of said special finding and verdict.

III. That the said circuit court erred in admitting testi-
122 mony on the trial offered by the defendant in error against the objection of the plaintiff in error, and to which the plaintiff in error then and there excepted.

IV. That the said court erred in excluding testimony on the trial offered by plaintiff in error under the objection of the defendant in error, to which plaintiff in error then and there duly excepted.

V. That the said court erred in refusing to reduce his instructions and charge to the jury to writing before giving the same to the jury upon the written request of the plaintiff in error therefor; to which refusal attorney for plaintiff in error then and there duly excepted.

VI. That the said court erred in refusing to give to the jury the instructions requested on behalf of plaintiff in error, numbered, respectively, one, two, three, four, five, seven, and eight, and each and every of said instructions; to which refusals, and each of them separately, the said plaintiff in error, by his attorney, then and there duly excepted.

VII. That the said court erred in giving to the jury the instructions requested by defendant in error, numbered, respectively, one, two, three, and four, and each and every of them; to giving of each of said instructions separately the said plaintiff in errror, by his attorney, then and there duly excepted.

123 VIII. That the said court erred in instructing the jury to find for the defendant in error; to which instruction the said plaintiff in error, by his attorney, then and there duly excepted.

IX. That the said court erred in instructing the jury to return special findings upon the propositions submitted to them by the court.

X. That the said court erred in overruling the motion for a new trial made and filed by the plaintiff in error upon the grounds stated in said motion; to which ruling the said plaintiff in error, by his attorney, then and there duly excepted.

XI. That the said court erred in rendering judgment for the said defendant in error when judgment ought to have been given for the said plaintiff in error, to which judgment the said plaintiff in error, by his attorney, then and there duly excepted.

And the said Milton F. Lamaster, plaintiff in error, prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that he may be restored to all things he has lost by reason thereof.

GEO. W. DOANE,
W. C. GOUDY,
Attorneys for Pl'ff in Error.

Endorsed on cover: Nebraska C. C. U. S. No. 652. Milton F. Lamaster, plaintiff in error, *vs.* John W. Keeler. Filed October 9, 1884.

123-376

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1887.

MILTON F. LAMASTER,
Plaintiff in Error,
vs.
JOHN W. KEELER,
Defendant in Error.

Error to the Circuit Court for the District of Nebraska.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

W. C. GOUDY,
FOR PLAINTIFF IN ERROR.

EARNARD & GUNTHORP, LAW PRINTERS, 44 & 46 LASALLE ST., CHICAGO.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1887.

MILTON F. LAMASTER,
Plaintiff in Error,
vs.
JOHN W. KEELER,
Defendant in Error.

Error to the Circuit Court for the District of Nebraska.

STATEMENT.

On the 17th day of July, 1882, a suit was commenced in the Circuit court of the United States for Nebraska by petition. John W. Keeler, the defendant in error, was the petitioner, and Milton F. Lamaster, the plaintiff in in error, was made defendant.

The suit was brought to recover the possession of lot nine (9) block fifty-six (56) in the city of Lincoln, the petitioner alleging that he was the owner in fee, and entitled to the possession. (Printed record, 1.)

On the 1st day of March, 1883, an amended answer to the petition was filed by Milton F. Lamaster, by which issues of fact were made. (Printed record, 9.)

The proceeding was in effect an ejectment suit brought for the purpose of recovering the possession of real estate, the plaintiff claiming to be the owner thereof in fee.

On the 28th of January, 1884, a trial was had before the court and a jury, which resulted in a verdict and judgment in favor of the plaintiff. (Printed Record, 16–19.)

The verdict of the jury was as follows:

"We, the jury, empaneled and sworn in this case, do find for the plaintiff, that he is entitled to the possession of the premises in the pleadings mentioned, to wit: Lot nine (9), block fifty-six (56) in the city of Lincoln, Lancaster county, State of Nebraska, and the defendant unlawfully withholds the same."

"First Special Finding.

"We, the jury, do further specially find that this action did not arise under the laws of the United States referring to executions."

"Second Special Finding.

"We, the jury, do further especially find plaintiff, J. W. Keeler and Thomas Ewing did not enter into any agreement or understanding whereby the said plaintiff agreed to reconvey to said Ewing the said premises, or hold the same for him." (Printed record, 18.)

The facts as developed on the trial, so far as necessary to be presented to this court, are substantially these: On the 12th day of November, 1875, the Circuit court of the United States for Nebraska rendered a judgment in favor of Seymour and Wardell against Young, for six thousand five hundred dollars debt, and eight hundred and fifteen and 97-100 dollars costs.

On the 23d day of February, 1875, the following act was passed by the Legislature of Nebraska.

"AN ACT to provide for stay of executions and orders of sale.

"Be it enacted by the legislature of the State of Nebraska:

"SECTION 1. Hereafter no stay of execution or order of sale upon any judgment or decree shall be granted for a longer time than nine months from and after the rendition of such judgment or decree.

"SEC. 2. The order of sale on all decrees for the sale of mortgaged premises shall be stayed for the period of nine months from and after the rendition of such decree whenever the defendant shall, within twenty days after the rendition of such decree, file with the clerk of the court a written request for the same. *Provided*, That if the defendant make no such request within said twenty days, the order of sale may issue immediately after the expiration thereof.

"SEC. 3. On all judgments for the recovery of money only, except those rendered in any court on an appeal or writ of error thereto or against any officer, or person or corporation, or the sureties of any of them, for money received in a fiduciary capacity, or for the breach of any official duty, there may be a stay of execution if the defendant therein shall, within twenty days from the rendition of judgment, procure two or more sufficient freehold sureties to enter into a bond acknowledging themselves security for the defendant for the payment of the judgment, interest and costs from the time of rendering judgment until paid, as follows:

"*First.* If the sum for which judgment was rendered, exclusive of costs, does not exceed fifty dollars, three months.

"*Second.* If the sum for which judgment was rendered, exclusive of costs, exceeds fifty dollars and does not exceed one hundred dollars, six months.

"*Third.* If the sum for which judgment was rendered, exclusive of costs, exceeds one hundred dollars, nine months.

"SEC. 4. Officers approving stay bonds shall require the affidavits of the signers of such bonds that they own real estate not exempt from execution, and aside from incumbrance, to the value of twice the amount of the judgment.

"SEC. 5. No proceedings in error or appeal shall be allowed after such stay has been taken, nor shall a stay be taken on a judgment, entered as herein contemplated, against any one who is surety in the stay of execution.

"SEC. 6. The sureties for the stay of execution may be taken and approved by the clerk, and the bond shall be recorded in a book kept for that purpose, and have the force and effect of a judgment confessed from the date thereof against the property of the sureties, and the clerk shall enter and index the same in the proper judgment docket, as in the case of other judgments.

"SEC. 7. When the surety is entered, after execution issued, the clerk shall immediately notify the sheriff of the stay, and he shall forthwith return the execution with his doings thereon.

"SEC. 8. All property levied on before stay of execution, and all written undertakings for the delivery of personal property to the sheriff shall be relinquished by the officer upon stay of execution being entered.

"SEC. 9. At the expiration of the stay the clerk shall issue a joint execution against the property of all the judgment debtors and sureties, describing them as debtors or sureties therein.

"SEC. 10. Where a stay of execution has been taken, such confessed judgment shall not release any judgment lien by virtue of the original judgment for the amount then due. The officer holding the execution shall return thereon what amount was made from the principal debtor and how much from the sureties.

"SEC. 11. Sections 478, 479, 480 and 481 of title 14, of chapter 57 of the revised statutes, are hereby repealed.

"SEC. 12. This act shall be in force and take effect from and after its passage.

"Approved February 23, 1875."

Laws of Nebraska, 1875, 49.

This act was not adopted by the United States Circuit court unless it was by an order of December 30, 1876, which is as follows:

"Ordered, that the laws of the State of Nebraska, now in force, regulating the issuing of executions and of the proceedings to be had thereon and thereunder be, and the same are hereby adopted as the rule of procedure to enforce the collections of judgments in the United States Circuit and District court for said state." (Printed record, 47.)

On the 25th day of November, 1875, a bond was filed in the United States Circuit court which reads as follows:

"Whereas, Charles W. Seymour and W. W. Wardell did, at the November term, 1875, of the United States Circuit court, holden at Omaha, within and for the district of Nebraska, recover a judgment in said court against William P. Young for the sum of six thousand five hundred dollars damages and for their costs in and about said suit.

"Now, therefore, we, John Irwin, Jane Y. Irwin, and William T. Donovan, Nathan F. Moffitt, and Milton F. Lamaster, freeholders in the State of Nebraska, do hereby acknowledge ourselves security for the defendant for the payment of the judgment, interests and costs from the time of rendering of said judgment until paid, to be paid in nine months from the rendering of the same.

"JOHN I. IRWIN,
"JANE Y. IRWIN,
"W. T. DONOVAN,
"MILTON F. LAMASTER,
"NATHAN R. MOFFITT."

To this bond the several affidavits of John Irwin, Jane Y. Irwin, W. T. Donovan and Nathan R. Moffitt are attached, being sworn to on the 19th, 24th and 25th days of November, 1875. The bond was marked "Approved Dec. 2, 1875. Watson B. Smith, clerk." (Printed record, 53.)

It will be noticed that there was no affidavit of justification by Lamaster.

On the judgment index of the United States Circuit court the following entry was made under L: "Defendants Lamaster, M. F. *et al.*, (surety); plaintiffs Seymour and Wardell. Appearance Docket Book C, No. 138. Date of judgment Nov. 12, 1875. Amount of judgment, $6,500." (Printed record, 20.)

There was no proof of the issuing of an execution prior to April 14, 1881, when it appears that a fifth *alias* execution was issued. (Printed record, 20.)

This execution commanded the marshal to make of the goods and chattels, and for want thereof then of the lands

and tenements, of William P. Young, debtor, and John I. Irwin, Jane Y. Irwin, W. T. Donovan, Milton F. Lamaster, and Nathan F. Moffitt, sureties, four thousand seven hundred forty-four and $\frac{31}{100}$ dollars, being the balance due April 2, 1887, on the judgment in favor of Seymour & Wardell. (Printed record, 33.)

This execution was levied on lot nine (9), block fifty-six (56), in the city of Lincoln, etc., as the property of Lamaster; it was appraised at four thousand five hundred forty-six $\frac{6}{100}$ dollars, and sold May 17, 1881, to Thos. Ewing for five thousand six hundred dollars. (Printed record, 34, 35.)

On the 27th of May, 1881, a motion was made by Lamaster, in the Circuit court of the United States, to set aside the sale, which was denied, and an order made confirming the sale and directing the marshal to execute a deed. (Printed record, 36, 38.)

On this motion it was claimed that the following defects in the sale existed, to wit: That the instrument purporting to be a bond was not the bond or deed of Lamaster; that he did not justify as to his sufficiency; that he was not approved of as surety; that the court had no jurisdiction to issue execution or render any judgment against him; that the notice of sale was insufficient, and that there was no judgment upon which execution could lawfully issue. (Printed record, 36–46.)

On the 9th day of May, 1882, the marshal executed a deed to Ewing. (Printed record, 49.)

On the 17th day of July, 1882, Ewing conveyed the premises to Keeler. (Printed record, 51.)

Nothing was paid by Keeler to Ewing at the time the

deed was made, but he executed three notes, making in the aggregate five thousand dollars, and made a mortgage to secure the payment thereof. (Printed Record, 63.)

This suit was commenced the same day Ewing conveyed to Keeler. Since the suit was commenced Keeler paid one of the notes.

Keeler's deposition was taken, and from it we learn that he resides in Decatur county and is a farmer of small means, and that the object of placing the title in him was for the purpose of bringing a suit in the United States court, based on the idea that the chances of recovery in that court were better than in one of the courts of the state. (Record, 55–63.)

It also appeared that Lamaster had commenced a proceeding in the District court of Lancaster county, Nebraska, against Ewing to set aside the sale, and that such suit was pending at the time that Ewing conveyed to Keeler, and when this case was tried. (Printed Record, 65–67.)

On the trial, the court was requested by the defendant to instruct the jury that the alleged judgment, entered or extended by the clerk upon the docket against the defendant, was null and void, and did not authorize the issuance of an execution against the property of the defendant, and that the execution was invalid. The court was further asked to instruct the jury that upon the evidence the plaintiff was not entitled to recover. The defendant also requested the court to instruct the jury that the act of the legislature of Nebraska, respecting the stay of executions and orders of sale, approved February 23, 1875, was not operative to authorize the execution against Lamaster's property. This instruction the court refused to give, and exception was taken.

On the part of the plaintiff the court gave the following instructions to the jury.

"II. The filing of the defendant's bond with the clerk of this court and its approval by him, and also his approval of the sureties thereto, including the defendant, the record of the same, the entry of memoranda thereof in the judgment index, called in the statute 'extending the judgment,' justified the issue by the clerk of this court of an execution upon the judgment of Seymour and Wardell against Young and others, directed to the marshal, commanding him to make the balance due upon the judgment out of the property of the principals and sureties, including that of the defendant Lamaster, and the sale by the marshal of the defendant's property under and by virtue of execution was authorized by law."

"III. I charge you that when this bond was taken by the clerk, as has been shown in evidence, and when the proceedings were taken thereon leading to the sale by the marshal of the property in question, the statute of this state passed on the 25th of February, 1875, and entitled 'An Act to provide for stay of executions and orders of sale,' was in force in this court and was a law therein, the same as in the District courts of the state."

To each of these instructions to the jury exception was taken by the defendant. (Printed Record, 30, 32.)

On the trial other questions were decided and exceptions taken, but I think it unnecessary to call the attention of the court to them, as I shall rely upon the proposition that there was no valid judgment or execution under which the property of Lamaster could be sold.

Errors Assigned.

"I. That the said Circuit court erred in setting aside the findings and special verdict of the jury returned into said court on the 13th day of December, A. D. 1883.

"II. That the said Circuit court erred in not dismissing the case out of said court upon the return of said special finding and verdict.

"III. That the said Circuit court erred in admitting testimony on the trial offered by the defendant in error against the objection of the plaintiff in error, and to which the plaintiff in error then and there excepted.

"IV. That the said court erred in excluding testimony on the trial offered by the plaintiff in error under the objection of the defendant in error, to which plaintiff in error then and there duly excepted.

"V. That the said court erred in refusing to reduce his instructions and charge to the jury to writing before giving the same to the jury upon the written request of the plaintiff in error therefor; to which refusal attorney for plaintiff in error then and there duly excepted.

"VI. That said court erred in refusing to give to the jury the instructions requested on behalf of plaintiff in error, numbered respectively, one, two, three, four, five, seven, and eight, and each and every of said instructions, to which refusals, and each of them separately, the said plaintiff in error, by his attorney, then and there duly excepted.

"VII. That the said court erred in giving to the jury the instructions requested by the defendant in error, numbered respectively, one, two, three, and four, and each and every of them, to giving of each of said instructions separately, the said plaintiff in error, by his attorney, then and there duly excepted.

"VIII. That the said court erred in instructing the jury to find for the defendant in error; to which instruction, the said plaintiff in error, by his attorney, then and there duly excepted.

"IX. That the said court erred in instructing the jury to return special findings upon the proposition submitted to them by the court.

"X. That said court erred in overruling the motion for a new trial made and filed by the plaintiff in error upon the grounds stated in said motion; to which ruling, the said plaintiff in error, by his attorney, then and there duly excepted.

"XI. That the said court erred in rendering judgment for the said defendant in error when judgment ought to have been given for the said plaintiff in error; to which judgment the said plaintiff in error, by his attorney, then and there duly excepted."

Points and Authorities.

I.

There was no valid judgment against Lamaster. Section 914 of the Revised Statutes provides that the practice, pleadings, forms and modes of proceeding in civil causes other than equity and admiralty causes, shall conform as near as may be to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record in the state within which such courts are held.

Section 916 provides "that the party recovering a judgment in any common law cause in any circuit or district court shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor as are now provided in like causes by the laws of the state in which such court is held, or by any such laws hereafter enacted, which may be adopted by general rules of such circuit or district court; and such courts may from time to time, by general rules, adopt such state laws as may hereafter be in force in such state in relation to remedies upon judgments, as foresaid, by execution or otherwise."

The object of section 914 was to reconcile the practice and pleadings of the Federal courts in code states with the practice and pleadings in the state courts, and it was not intended to incorporate into the United States practice state laws.

Nudd v. *Burrough*s, 91 U. S.
R. R. Co. v. *Horst*, 93 U. S.

Section 916 relates only to the subject of executions, and only the acts in force June 7, 1872, when the act was passed, were adopted by Congress. A general rule of court was required to adopt any act of a state passed after that time. The Nebraska act, under which the execution was issued, was not passed until 1875, and it was not adopted by rule of the court until in 1876, which was after the time the bond, claimed to be the basis of a judgment, was filed in court.

The Circuit court had no power to adopt the state statute of 1875, because Congress has provided in sections 987 and 988 for the stay of execution on judgments rendered in the United States court.

Section 987 establishes a mode by which an execution may be stayed for the purposes of allowing an application for a new trial.

Section 988 provides that "in any state where judgments are liens upon the property of the defendant, and where by the laws of such state defendants are entitled, in the courts thereof, to a stay of execution for one term or more, defendants in actions in the courts of the United States, held therein, shall be entitled to a stay of execution for one term."

Congress having fixed the rule for the stay of execution on judgments rendered by the federal courts, it was not in the power of any court to change that rule by adopting the provisions in a state statute establishing a different mode.

This section was originally passed May 19, 1828, as

the second section of the act which gave the Congress of the United States power to adopt the statutes relating to final process, by rule of court. The statute was re-enacted August 1, 1842, to apply to states admitted since 1828; it was re-enacted as section 988 when the revised statutes were adopted.

Therefore the Circuit court of Nebraska had no power to adopt the state statute of 1875, authorizing a stay of execution for nine months upon the execution of a bond, and there was no power in the clerk to approve of such a bond, or extend any judgment against the sureties signing the same.

Wayman v. *Southard*, 10 Wheaton, 1.
Bank v. *Halstead*, 10 Wheaton, 51.
Kearoy v. *Bank*, 16 Peters, 89.
McKracken v. *Hayward*, 2 Howard, 608.
Mayor v. *Lord*, 9 Wallace, 409.
Duncan v. *Darst*, 1 Howard, 301.
Boyle v. *Zacharie*, 6 Peters, 648.
Beer v. *Houghton*, 9 Peters, 329.
Homer v. *Brown*, 16 Howard, 354.

II.

The decision of the Circuit court of Nebraska denying the motion of Lamaster to set aside the sale, does not prevent him from litigating the questions arising upon that motion.

Freeman on Judgments, Secs. 255, 325, and cases cited.
Boggs v. *Clark*, 37 Col., 236.

Even if this is not true there can be no question of the right of Lamaster to raise the question as to the jurisdiction of the court in entering up by its clerk a judgment on the bond, if the Circuit court of Nebraska had no power to proceed under the state statute, because it was not adopted, or had no power to adopt. Thus the court never had any jurisdiction of Lamaster or his property, and the whole process is void. The question of jurisdiction can be raised at any and all times, and in every proceeding.

Freeman on Judgments, Sec. 120, and cases cited.

There are no presumptions in favor of the jurisdiction of the United States courts, but the facts upon which it rests must appear in some form in the record.

Ex parte Smith, 94 U. S., 455.
Shriver's Lessee v. *Lynn*, 2 Howard, 43.
Williamson v. *Berry*, 8 Howard, 541.
Elliot v. *Piersol*, 1 Peters, 328.
Lessee of Hickey v. *Stewart*, 3 Howard, 750.
Kilbourn v. *Thompson*, 103 U. S., 197.
Pennoyer v. *Neff*, 95 U. S., 714.

ARGUMENT.

I.

THERE WAS NO VALID JUDGMENT AGAINST LAMASTER UNDER WHICH THE LOT COULD BE SOLD.

The record fails to disclose a judgment according to the forms and practice prevailing in the courts of the United States. There was a judgment rendered in favor of Seymour against Young, but Lamaster was not a party to it. If there was any judgment against Lamaster it was by force of the bond delivered to the clerk and by him approved, and the entries made upon the judgment docket kept by him. This bond and the judgment entries did not constitute a judgment unless the United States court could take notice of the statute of Nebraska and constitute it a part of the record; and even then there is only a judgment by argument or inference; there is no judgment in form anywhere upon the record; unless such a proceeding is authorized by the acts of Congress it is wholly void.

As I have not seen any brief or argument for the appellee, it is only a matter of conjecture as to the grounds on which it will be claimed that there was a judgment against Lamaster. It may be supposed that an effort will be made to show that the bond and entries by the clerk constituted a judgment by virtue of some legislation of the United States.

Section 914 of the Revised Statutes reads as follows:

"The practice, pleadings, forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District courts shall conform as near as may be to the practice, pleadings, forms and modes of proceeding existing at the time in like causes in the courts of records of the state within which such Circuit and District courts are held, any rule of court to the contrary notwithstanding."

If this were the only provision of the statute there might be room for contending that the bond executed according to the Nebraska statute was a mode of proceeding existing in the courts of the state which came within the provisions of section 914, and that the execution issued thereon also came within the terms of this section. But such an inference is repudiated by the provisions of section 916, which is as follows:

"The party recovering a judgment in any common law cause in any Circuit or District court shall be entitled to similar remedies upon the same by execution or otherwise to reach the property of the judgment debtor as are *now* provided in like causes by the laws of the state in which such court is held, or by any such laws *hereafter* enacted which may be adopted by general rules of such Circuit or District court; and such courts may, from time to time, by general rules, adopt such state laws as may *hereafter* be in force in such state in relation to remedies upon judgments, as aforesaid, by execution or otherwise."

Section 916 shows that section 914 was not intended to include remedies by execution to reach the property of the judgment debtor. Section 914 authorized practice, pleadings and forms and modes of proceeding existing *at*

the time in like causes in the courts of record in the state. This time, apparently, was the time of the trial of the cause. But section 916 established a different rule with reference to the mode of enforcing a judgment in such cases. Congress provided that the same remedies might be had as were authorized by the laws of the state at the time of the passage of the act, and in case any future legislation should be had upon that subject the court was authorized to adopt such legislation by general rules; in the absence of any such adoption the subsequent legislation of the state relating to executions, would not be in force in the courts of the United States.

The Nebraska act of 1875 was not in force when section 916 was enacted and it was not adopted by a rule of the court until December 30, 1876, more than a year after the bond was filed with the clerk and the entries made on his judgment docket. Such statutes could not be adopted by usuage because the act of Congress required it should be done by general rules, and these could only be made by entering the same of record.

Sections 987 and 988 of the revised statutes reads as follows:

§ 987. "When a Circuit court enters judgment in a civil action, either upon a verdict or on a finding of the court upon the facts, in cases where such finding is allowed, execution may on motion of either party, at the discretion of the court, and on such conditions for the security of the adverse party as it may judge proper, be stayed forty-two days from the time of entering judgment, to give time to file in the clerk's office of said court a petition for a new trial. If such petitition is filed within said term of forty-two days, with a certificate thereon

from any judge of such court that he allows it to be filed, which certificate he may make or refuse at his discretion, execution shall, of course, be further stayed to the next session of said court. If a new trial be granted the former shall be thereby rendered void."

§ 988. "In any state where judgments are liens upon the property of the defendant, and where by the laws of such state, defendants are entitled, in the courts thereof, to a stay of execution for one term or more, defendants in actions in the courts of the United States, held therein shall be entitled to a stay of execution for one term."

If it be said that there is no inconsistency between the Nebraska statute and section 987, and therefore the Circuit court could adopt the state practice directed by the act, such certainly cannot be maintained of section 988. It is true that section 987 refers to stays of execution for a particular purpose, viz: for the purpose of allowing for a motion for a new trial to be decided. But such was not the purpose of section 988.

Assuming that the legislative act of Congress, in section 987 is not exclusive, we are still met by section 988. This section is general in its purpose, and is so expressed as to be instead of state laws allowing a stay of execution.

All the conditions stated in it existed at the time by law in the State of Nebraska. Judgments were a lien on property in that state, and a stay of execution was given by the act under consideration. Where, then, did the Circuit court get the power to overrule this plain provision of the statute of the United States, and proceed to grant a stay in accordance with the Nebraska act?

The Circuit court nullifys the act of Congress, and sets up in its place an act of the State of Nebraska, which was designed by Congress to be superseded by this very section.

The force of this position is very clearly seen when we look into the history of this section, as it now stands in the revised statutes.

It was originally passed in May 19, 1828, and was the *second* section of the act passed on that date.

This act is the one under which formerly the federal courts proceeded in adopting or following state statutes regulating practice.

It is very significant that in the very act giving the courts of the United States power to adopt statutes of the states relating to final process, by rules of court, this section should be found. It clearly demonstrates that Congress intended it to take the place of any state laws upon the subject.

This act was re-enacted so as to apply to states admitted into the Union since 1828. This re-enactment took place August 1, 1842.

It is also very significant that during all the changes that have taken place in sections 1 and 3 of this act, this second section should remain unchanged practically.

Sections 1 and 3 of this act are not found in the revised statutes, and seem to be superseded by sections 914, 915, and 916 of revised statutes, which were originally passed as sections 5 and 6 of the act of June 1, 1872.

But this section 2 of the act of 1828 is found in the revised statutes as section 988, and was re-enacted when the revised statutes were adopted in 1874.

It stands, therefore, to-day with just the same force and effect it had formerly, and exercises the same restriction upon the powers of the Federal courts to adopt state statutes, under section 916 of the revised statutes, as it did upon their power to do so under the act of 1828.

It follows clearly that the whole proceeding of the clerk of the Federal court for the district of Nebraska, under this Nebraska act was illegal and void; that there never was any valid judgment against the plaintiff in this suit, consequently no valid sale, and no title at all in the defendants to the land in question.

Where Congress has legislated upon a particular subject the act must be the exclusive rule, and a court cannot adopt a statute of a state repugnant to the act of Congress. As Congress had legislated upon the subject of stay of executions and provided a mode by which it may be had, it was not in the power of the Circuit court of Nebraska to adopt the statute of that state, passed in 1875, on the same subject. This was held in *Wayman* v. *Southard*, 10 Wheaton, 1, where Chief Justice Marshall delivered the opinion.

In that case a motion was made to quash the marshal's report on an execution issued on a judgment in the Circuit court of the United States for the District of Kentucky, and also to quash the replevin bond taken on the execution, because the marshal had proceeded under the statute of Kentucky in relation to executions. The court held that the laws of Kentucky did not apply to the federal courts because they had been passed after September 29, 1789, when the act of Congress was adopted concerning the final process existing at that time. The same rule was laid down in the *Bank* v. *Halstead*, 10 Wheaton, 51.

A statute of a state, *proprio vigore*, cannot affect the modes of proceeding in a court of the United States. It is obligatory only so far as adopted by Congress, or by the court, under the authority of Congress. A court of the United States cannot by a rule, adopt the provisions of a state law which is repugnant to a positive enactment by Congress.

Keary v. *Bank*, 16 Peters, 89.
McCracken v. *Hayward*, 2 Howard, 608.
Mayor v. *Lord*, 9 Wallace, 409.
Duncan v. *Darst*, 1 Howard, 301.
Boyle v. *Zacharie*, 6 Peters, 648.
Beer v. *Houghton*, 9 Peters, 229.
Homer v. *Brown*, 16 Howard, 364.

It follows from these views that the Circuit court erred in charging the jury that the statute of Nebraska, passed on the 23d February, 1875, and entitled, An Act to Provide for Stay of Executions and Order of Sales, was in force in the United States Circuit court of Nebraska, and was a law therein, when the bond was taken, the same as in the District courts of the state.

Congress had expressly provided for the stay of executions in a different mode, and therefore it was not in the power of the United States Circuit court to adopt the act of February 23, 1875. And even if that were not so, the Nebraska act of 1875 had never been adopted by act of Congress, because it was not an existing law when the federal legislation was had, and it had not been adopted by a general rule of the court since that time and before the bond was taken by the clerk.

It was the duty of the court to have charged to the

jury as requested by defendant's seventh instruction, that the act of the legislature of Nebraska, respecting the stay of executions and orders of sale, approved February 23, 1875, was not operative to authorize the execution against Lamaster's property, and also to tell the jury that upon the evidence the plaintiff was not entitled to recover.

II.

THE DECISION OF THE CIRCUIT COURT OF NEBRASKA, DENYING THE MOTION OF LAMASTER TO SET ASIDE THE SALE, CANNOT PREVENT HIM FROM QUESTIONING THE VALIDITY OF THE JUDGMENT IN THE ACTION OF EJECTMENT.

The general rule is that no one would be barred by the decision of any motion or proceeding arising out of an action, but would be allowed to litigate the same matters in any independent suit in which they are drawn in question, and the principle of *res adjudicata* has no application to a mere interlocutory motion.

Freeman on Judgments, Secs. 225 and 325, and cases cited therein.

But whatever may be said in regard to some of the questions presented on the motion, I suppose it will not be claimed that Lamaster is now prevented from raising the question as to the validity of the judgment and execution. It may be that he is concluded as to his execution of the bond and other similar points, but at all times, in every court, a party is at liberty to raise the question that a judgment or execution is void.

A judgment pronounced by a tribunal having no authority to determine the matter in issue is necessarily and incurably void, and may be shown to be so in any collateral or other proceeding on the subject. As power over the subject-matter is given by law, nothing but an additional grant from legislative authority can extend that power over a class of cases formerly excepted, and neither the acquiescence of the parties, nor their solicitations can authorize any court to determine any matter over which the law has not authorized it to act.

Freeman on Judgments, Sections 120 and 123.
Harvey v. *Tylor*, 2 Wallace, 342.
Galpin v. *Page*, 18 Wallace, 350.
Shreiver's Lessee v. *Lynn*, 2 Howard, 43.
Elliott v. *Piersol*, 1 Peters, 328.
Lessee of Hickey v. *Stewart*, 3 Howard, 750.
Kilbourn v. *Thompson*, 103 U. S., 197.
Williamson v. *Berry*, 8 Howard, 541.

A void act cannot be made valid by any subsequent proceeding of the court subsequently to a sale based on such void act. If there was no judgment against Lamaster, and no valid execution, the action of the court in confirming the sale made under such void judgment and execution could not divest Lamaster of the title to his property.

Therefore, the plaintiff in error is not estopped from questioning the proceeding under which the defendant in error recovered the judgment in this action.

It may well be questioned whether there was any valid

bond even according to the statute of Nebraska. There was no obligee named in the bond; there could be no contract unless there were two parties to it. There was no justification in the bond as to the sufficiency of Lamaster as a surety, as required by the Nebraska law. There was such an affidavit attached with the name of Lamaster cut therefrom—this was enough to inform the clerk that he did not intend to become a surety; it would follow that the approval of the bond would be an approval of the other persons as sureties, not including Lamaster. If so, the clerk erred in making entries on his judgment docket of a judgment against Lamaster; it should have been only as against the parties who had justified as to their sufficiency.

It may well be questioned as to whether the court had jurisdiction, because the suit was a controversy in fact between Ewing and Lamaster, and Keeler had no interest in the premises. Other errors appear in the record which I do not deem necessary to discuss. It seems to be clear that the clerk erred in acting under the Nebraska statute. And the Circuit court erred in holding that his proceeding established a valid judgment or that the execution issued thereon was in accordance with law.

W. C. Goudy,

For Plaintiff in Error.

23-596

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1887.

No. 76.

MILTON F. LAMASTER,

Plaintiff in Error,

against

JOHN W. KEELER,

Defendant in Error.

BRIEF OF JOHN F. DILLON FOR THE PLAINTIFF IN ERROR.

BURGOYNE QUICK PRINTING CO., COR. WALKER AND CENTRE STS.

In Supreme Court United States,

OCTOBER TERM, 1887.

MILTON F. LAMASTER,
Plaintiff in Error,

AGAINST

JOHN W. KEELER.

No. 76.

Statement.

EJECTMENT by *Keeler* against *Lamaster* for Lot 9, Block 56, Lincoln, Nebraska. Trial to jury. Verdict and judgment for the plaintiff below. Defendant below is the plaintiff in error. THE ERRORS arose upon the admission and rejection of evidence, and the instructions to the jury and refusal to instruct. Mr. DOANE'S BRIEF for the plaintiff in error, contains a full statement of the case; the assignment of errors, and in the Appendix thereto, the instructions given and refused. In the Appendix to this Brief, the Process Acts of Congress and the Nebraska Stay Act of February 23, 1875, are reprinted for the convenience of the Court.

Argument for the Plaintiff in Error.

BY JOHN F. DILLON.

I.

The Marshal's sale of the lot in question was void for the reason that the stay bond which the clerk approved and the judgment which the clerk assumed to index or extend against the defendant (Lamaster) under the Nebraska Stay Act of February 23, 1875, was approved and entered without authority of law, since that Act, being passed subsequent to the Act of Congress of June 1, 1872, Sec. 6 (now Rev. Stats., Sec. 916) and subsequent to December 1, 1873, when the Revised Statutes of the United States took effect, and not having been adopted by any rule of the Circuit Court, had no application to the judgment of Seymour and Wardell vs. Young, rendered November, 1875, or to the execution issued thereon or to the proceedings thereunder.

The giving of the stay bond by the defendant and others, and its approval by the clerk, was coram non judice, and wholly inoperative. It did not have the legal effect to stay the right of the plaintiff in the judgment to an execution at once or at any time, non obstante the stay

bond, and such bond being given and approved without authority of law, neither it nor any action of the clerk thereunder, created any rights in favor of the judgment creditor or any liability on the part of the signers of the bond.

UPON THE EVIDENCE ADDUCED, as set forth in the bill of exceptions, the questions involved in the foregoing proposition were presented to the Court by the defendant's first, second and third instructions, which the Court severally refused to give, and to which refusal the defendant duly excepted (Record, p. 30). They also arise upon the peremptory instruction which the Court gave (Record, p. 31), directing "the jury to find a general verdict for the plaintiff," to which an exception was taken; and also upon the giving of the second instruction as asked by the plaintiff (Record, p. 32), to the effect

"That the defendant's bond and the proceedings of the clerk in respect thereto, justified the issue of the execution and that the sale by the marshal of the defendant's property by virtue thereof was authorized by law."

To which instruction the defendant duly excepted."

It was in evidence (Record, pp. 24, 53) that no order or rule of Court was made adopting the State laws in relation to executions and proceedings thereunder until the *30th of December, 1876* (see text of rule, Record, p. 53); in view of which the Court also erred in giving the third instruction asked by the plaintiff, as follows:

III. I charge you that when this bond was taken by the clerk as has been shown in evidence (approved De-

cember 2, 1875, Record, p. 54), and when the proceedings were taken thereon, leading to the sale by the marshal of the property in question, the Statute of this State passed February 23, 1875, entitled "*An Act to provide for the stay of executions and orders of sales,*" was in force in this Court and was a law therein, the same as in the District Courts of the State."

This instruction was also excepted to by the plaintiff.

These refusals to instruct as prayed by the defendant, the giving of the instructions as prayed by the plaintiff, and the Courts' peremptory instruction, are assigned as errors; and raise on the record the questions involved in the above proposition.

THE COURT was of the opinion, and laid down the law to the jury accordingly, that the Stay Act of Nebraska of February 23, 1875, (which is conceded to be the sole basis of the execution sale of the defendant's property,) was applicable to the judgment of *Seymour and Wardell vs. Young*, rendered at the November Term, 1875, although there was no rule of Court making it applicable and no rule adopted until December 30th, 1876, more than a year after the bond in question was taken and approved by the Clerk. The instruction of the Court was that the "Nebraska Stay Act of February 25th, 1875, was in force in that Court and was a law therein" on December 2d, 1875, when this bond was given and approved (p. 32).

AS IT IS AN ESTABLISHED PRINCIPLE that State laws, *proprio vigore*, do not and cannot affect the process or proceedings in the Federal Courts until adopted by Congress or under its authority, the discussion is narrowed to the point, *Whether this Nebraska Act of February 23d, 1875, had been thus adopted?* As it is affirmatively shown that it had not been adopted by a rule of Court,

there can be but one possible ground on which it could be in force in the Circuit Court or be a law therein, namely, its adoption by Act of Congress. This bond was taken and approved by the Clerk, and the so-called judgment extended or entered thereon by the Clerk on December 2, 1875, and the question is, whether on that day the Stay Act of February 23, 1875, had been adopted by Act of Congress.

THIS INVOLVES A CONSTRUCTION OF SECTION 916 of the Revised Statutes, originally section 6 of the Act of June 1st, 1872, entiled "*An Act to further the administration of Justice*" (17 Statutes, 197). If we had nothing to guide us in this inquiry but the language of section 916 (which, while it altered the phraseology, did not alter the meaning of section 6 of the Act of June 1st, 1872), it would, we submit, be plain that Congress adopted for the Courts of the United States "similar remedies upon judgments as are *now provided* [*i. e.*, June 1, 1872] in like causes by the law of the State in which such Court is held," with power by general rules to adopt future State laws "in relation to *remedies upon judgments*, by execution or otherwise." That is to say Congress adopted the then existing State laws, namely, those laws existing on June 1st, 1872, or if the Revised Statutes be held to be a separate enactment, then the laws of the States in force on the 1st day of December, 1873; and gave the Federal Courts the power by "general rules to adopt such State laws as may *hereafter* be in force in such State *in relation to remedies upon judgments as aforesaid by execution or otherwise.*" Advert to the text of section 916, and see how obvious this is. Can exposition make it plainer?

I adopt as pertinent the language of Chief-Justice MARSHALL in *Wayman vs. Southard* (10 Wheat., 22):

"This seems to be one of those plain propositions which reasoning cannot render plainer."

But if any doubt could exist as to the true construction of section 916 such doubt would be laid to rest by considering the subject in its legislative historical development, in connection with section 5 of the Act of June 1st, 1872, (now Revised Statutes, section 914,) and Revised Statutes, section 915, which latter section was originally part of section 6 of the Act of June 1st, 1872.

Process Acts and Their Construction.

THERE WERE THREE MAIN PROCESS ACTS PRIOR TO THE ACT OF JUNE 1ST, 1872, namely, the temporary act of 1789 (1 Statutes at Large 92, commented on in *Wayman vs. Southard*, 10 Wheat., 22, and many subsequent cases), which continued until 1792, when the permanent act was passed on the subject, which enacts as follows:

PROCESS ACT 1792. "That forms of writs, executions, and other process, except their style, and the forms and modes of proceeding in suits in Courts of common law, shall be the same as are *now used* in the said Courts respectively, in pursuance of the act entitled '*An Act to regulate process in the Courts of the United States*,' except so far as may have been provided for by the act to establish the Judicial Courts of the United States; subject, however, to such alterations as the said Courts respectively shall, in their discretion, deem expedient, or to such regulations as the Supreme Court of the United States shall think proper, from time to time, by rule, to prescribe to any Circuit or District Court concerning the same" (1 Stats., 275).

THE SETTLED CONSTRUCTION OF THE PROCESS ACTS of 1789 and 1792 (*supra*), was, that they adopted the State laws in respect to remedies upon judgments, and the mode of enforcing execution on common law judgments which were in force in September, 1789 (the date of the Process Act of that year), and they did *not* adopt future State laws on those subjects; and that such future State laws are not applicable to the Federal Courts unless adopted by rule of Court.

The leading cases on the subject will be referred to in the course of this argument.

REFERENCE WILL NOW BE MADE MORE IN DETAIL to some of the judgments in this Court upon the subject, which directly bear upon the questions which arise on the record of the present cause.

THE CASES of *Wayman vs. Southard* (10 Wheat., 1) and *Bank vs. Halstead* (10 Wheat., 51, 1825) *establish these propositions:*

1. That Congress has, and the several States have not, power to legislate concerning executions issued by the Federal Courts, and the proceedings thereunder. State laws on the subject have no application to the Federal Courts until adopted by authority of Congress.

2. That the 34th section of the Judiciary Act that "the laws of the several States shall be rules of decision in trials at common law in the Courts of the United States," furnishes "a rule to guide the Court in the formation of its judgment; not one for carrying the judgment into execution" (10 Wheat., 24), and has no relation to writs of execution or proceedings thereunder.

3. The Process Act of May 8, 1792 (1 Stats, 275) adopts the laws of the several States as to executions, existing September 22, 1789, with power in the Courts by rule to adopt in their discretion subsequent alterations.

"The Act" (Process Act, 1792) "adopts the State law as it then stood, not as it might afterward be made," and the Marshal having an execution, must, as to levy, *mode of sale*, &c., "conform to the law of the State, as it existed in September," 1789. (10 Wheat., 32).

Hence, the Statute of Kentucky of 1821, giving stays on judgments requiring appraisement, authorizing payment in bank notes &c., not having been by rule adopted by the Federal Courts, was not applicable to executions issued from such courts, and the Marshal was bound to disregard the same and sell according to the State laws in force in 1789.

4. The power to make rules adopting subsequent State laws was sustained (MARSHALL'S Op. 10 Wheat., 45–47); THOMPSON J., *Ib.*, p. 58–60), where the reasons why Congress did not adopt future State laws by anticipation, but vested this power in the courts of the United States, to be exercised from time to time in their discretion, are stated and explained.

In *Wayman vs. Southard*, the Marshal's return on the *fi fa* that he had proceeded under the Stay laws of Kentucky recently passed, and taken from the judgment debtor a stay or replevin bond was held to be insufficient, such stay laws having been passed subsequent to 1789, and not having been adopted by any rule of the Circuit

Court; and the Supreme Court held that the return of the Marshal that he had taken a stay bond was insufficient, and his return, as well as the stay bond, was quashed.

In *Halstead's case*, lands which in 1789 were not subject to sale on execution in Kentucky, having subsequently been made by statute subject thereto, it was held that it was competent for the Federal Court by *rule* to make lands subject to sale on execution issued out of such Court. And it was also held that the Kentucky Act of 1821 *requiring property to sell for three-fourths of its appraised value*, was not applicable to judgments in the Federal Courts, and the return of the marshal that he had not sold the property levied on because it did not bring three-fourths of its appraised value was quashed.

THESE DECISIONS were made in 1825, and on May 19, 1828, the Process Act of that year was passed by Congress (4 Stats, 281).

This Act (Sec. 3) adopted for all the States the laws existing therein on May 19, 1828, concerning executions. It followed the model of the Act of 1792, but changed the date at which the State laws were adopted, from 1789 to 1828. It also followed the model of the Act of 1792, in *not* adopting future State laws, but conferring that power upon the Courts to be exercised from time to time in their discretion, by *rules* to be adopted in relation thereto.

STATE LAWS ENACTED AFTER THE ACT OF 1828, and prior to the Act of June 1, 1872, relating to the remedies upon judgment, had no effect in the Federal Courts

unless adopted by rule under the third section of the Act of 1828.

McCracken vs. Hayward, 2 How., 608, 615, 1844.

In this case it appeared that in 1841 Illinois passed an act forbidding the sale of property on execution for less than two-thirds of its appraised value. The U. S. Circuit Court for Illinois adopted in part and with modifications this Act, by rule made in June, 1841.

The plaintiff had obtained a judgment in 1840 in the Circuit Court of the United States for Illinois ; and in 1842 issued execution thereon. It was held : 1st. That the Illinois Appraisement Act of 1841 was inoperative as to executions upon judgments or debts in existence when the Appraisement Act was passed ; 2d. That the Illinois Act of 1841 was not adopted by the Process Act of 1828 ; 3d. That the rule of Court adopting the Illinois Act of 1841 in part and with modifications, was unauthorized ; 4th. The Marshal's duty was to sell the property without regard to the Illinois Appraisement Act of 1841.

In this case the Court said :

" Prior to 1828 Congress passed no process acts applicable to the States admitted into the Union after 1789. To remedy this defect, *and to confirm the decisions in the above cases* (*Wyman vs. Southard* and *Bank vs. Halstead*), the Act of May, 1828, directed that writs of execution and other final process issued on judgments and decrees, and the proceedings thereupon, shall be the same in each State as are *now used* in the Courts of such State, &c., thus adopting the same principles which had been established by this Court in the construction of the Acts of 1789 and 1792. CONSEQUENTLY NO STATE LAW PASSED SINCE MAY, 1828, *can have any effect on the proceedings on executions issued from the Courts of the United States, unless such laws*

are adopted by those Courts under the proviso in the third section of the act (2 Howard, 615).

In *Beers vs. Haughton* (9 Pet., 329, 1835), the Ohio Act of 1823 *regulating bail* on writs of *capias*, which Act was in force May 19, 1828 (when the Process Act of 1828 was passed), it was held that the Ohio Act related to "proceedings on writs of execution and other final process," and hence it was adopted by the Act of 1828.

After reviewing the previous legislation of 1789 and 1792 and the decisions in respect thereto, and coming to the Act of 1828, Mr. Justice STORY says (pp. 361, 362) :

"This act [1828] was made after the decisions in *Wayman vs. Southard*, and the *Bank of the United States vs. Halsted* (10 Wheat., 1 and 51), and was manifestly *intended to confirm the construction* given in those cases to the acts of 1789 and 1792, and to continue the like powers in the courts to alter and add to the processes whether mesne or final, and to regulate the modes of proceedings in suits and upon processes, as had been held to exist under those acts. The language employed seems to have been designed to put at rest all future doubts upon the subject. But the material consideration now, to be taken notice of, is that the act of 1828, expressly adopts mesne processes and modes of proceeding in suits at common law, *then* existing in the highest State courts under the State laws, which, of course, *included all the regulations of the State laws as to bail*, and exemptions of the party from arrest and imprisonment. In regard also to writs of execution and other final process, and "the proceedings thereupon," it adopts an equally comprehensive language, and declares that they shall be the same as were *then used* in the courts of the State. Now, the words "the proceedings on the writs of execution and other final process," must from their very import, be construed to

include all the laws which regulate the rights, duties, and conduct of officers in the service of such process, according to its exigency, upon the person or property of the execution debtor, and also all the exemptions from arrest or imprisonment under such process created by those laws" (9 Pet., pp. 361, 362).

In *Ross vs. Duval* (13 Peters, 45, 1839), Mr. Justice McLean, speaking of the Acts of 1789 and 1792 says (p. 58), "These acts adopt the execution laws of the "States, as they stood in 1789." Speaking of the Act of May 19, 1828, he says (p. 64):

"The Act of 1828, was passed shortly after the decision of the cases of *Wayman vs. Southard* (10 Wheat., 1), and the *United States Bank vs. Halsted* (10 Wheat., 51), and was intended as a legislative sanction of the opinions of the Court in those cases.

"This Act is more explicit than the previous acts on the same subject, as to the power of the courts of the United States to adopt rules to regulate final processes. And it is well remarked by Mr. Justice Story, in giving the opinion of the Court in the case of *Beers and others vs. Haughton* (9 Pet., 363), that, under this law, 'the Circuit Court had authority to make such a rule, as a regulation of the proceedings upon final process, so as to conform the same to those of the State laws on the same subject.' And this power to adopt rules, so as to conform to State laws, extends to the *future* legislation of the State, *and as well to the modes of proceeding on executions*, as to the forms of the writs."

Act June 1, 1872, Secs. 5, 6; now Revised Stats., Secs. 914, 915, 916.

Coming to the Act of June 1, 1872 (17 Stats., 196), we find that as to final process and proceed-

ings thereon, Congress legislated in section 6 of that Act upon precisely the same principles that it had in the Acts of 1792 and 1828, and in view of the settled construction of those Acts. It absolutely adopted the laws of the States *then* (June 1, 1872) in force concerning executions, with power in the Courts, as before, by general rules, to adopt, in their discretion, *future* State laws. Section 6 treated of both of remedies by attachment and remedies upon judgments in common law causes; but the revisors separated these and put that part of the section relating to attachments in section 915 of the Rev. Stats., and that part relating to judgments and executions in section 916.

Section 5 of the Act of 1872, as to pleadings and practice prior to final judgment was put into section 914. There was no change of substance in either sections 914, 915 or 916.

THE EFFECT of the Act of June 1, 1872, was to adopt the laws of Nebraska as to executions which were in force on that day; and such laws and no others were in force in the Federal Courts on December 2, 1875, unless such other laws were duly adopted by general rules. The language of Mr. Justice CLIFFORD, giving the judgment of this Court in *Riggs vs. Johnson County* (6 Wall., 190, 191) as to the effect of the previous Process Acts is equally applicable to the Act of 1872 and § 916 of the Rev. Statutes.

"Forms of process, *mesne* and final, and the modes of process varied in essential particulars from the principles and usages of the common law, and in many cases they were different in the different States. Intention of Congress, in passing the Process Acts, was, that the forms of writs and executions, and the modes of process and proceedings in common lawsuits, in the several

Circuit Courts, should be the same as they were *at that time* in the Courts of the respective States. Instead of framing the forms of process, and prescribing the modes of process, Congress adopted those already prepared and in use in respective States, not as State regulations, but as the rules and regulations prescribed by Congress for use in the several Circuit Courts.

ADOPTED, AS THEY WERE, BY AN ACT OF CONGRESS, *they became the permanent forms and modes of proceeding, and continue in force wholly unaffected by any subsequent State legislation.* ALTERATIONS CAN ONLY BE MADE BY CONGRESS *or by the Federal Courts, acting under the authority of an Act of Congress.*"

SECTIONS 914, 915 AND 916 OF THE REVISED STATUTES having been enacted at the same time should be construed in the light of each other, as well as in the light of the previous legislation of Congress.

SECTION 914 WAS INTENDED, in common law causes, to assimilate, as near as may be, the pleadings and proceedings in the Federal Courts prior to judgment, to those existing at the time in like causes in the State Courts, any rule of Court to the contrary notwithstanding.

"It [the Act of June 1, 1872, § 5] had its origin in the Code enactments of many of the States, and was intended to relieve the profession from the burden of studying and of practicing under two distinct and differing systems of the law of procedure.

Indianapolis, &c., R. R. Co. vs. Horst, 93 U. S., 299, 300.
S. P. Nudd vs. Burrows, 91 U. S., 441.

The natural and usual meaning of the language "practice, pleadings, and forms and modes of proceeding," &c., confines the provisions of section 914 to the progressive steps in a civil suit from its commencement to final judgment. The section is prospective, and is self-conforming to future changes in these respects in the laws of the State.

But when Congress came to deal with "remedies by attachment or other process against the property of the defendant" (Sec. 915), and with remedies upon judgments (Sec. 916), it made separate and differing provisions. Congress adopted in both these cases "the remedies which are *now* provided by the laws of the State" with power by "general rules to adopt such State laws as may be in force" or "*hereafter* enacted" in such State.

As to final process this legislation was founded upon precisely the same principle which had been sanctioned in the Acts of 1879, 1792 and 1828, and the well-known decisions of this Court construing those Acts.

We submit, therefore, that it is plain that the Nebraska Stay Act of February 23, 1875, had no application to the Seymour & Wardell judgment on the 2d day of December, 1875, since at that date it never had been adopted by the Circuit Court for Nebraska.

Such adoption could only be by "general rules." Such is the statute. And this Court has even held that the District Judge had no such power without the concurrence of the Circuit Judge.

Amis vs. Smith, 16 Pet., 311, 314.

Action of ministerial officers will not establish adoption of State law.

Moncure vs. Zunts, 11 Wall., 416.

The rule adopted on December 30, 1876, was adopted by the District Judge alone (Record, p. 47); it did not profess to be retroactive, and was not; and it could have no effect on the stay bond, approved more than a year before, even the rule had, in terms, been made retrospective, and had expressly adopted the Stay Act of February 23, 1875.

A bond given to stay a judgment is part of the remedies upon judgments or the proceedings upon execution, and so falls within the Process Acts.

Thus, a *forthcoming bond* given upon a writ of execution under State laws in force in 1828, is part of the proceedings on final process, and as such adopted by the Process Act of May 19, 1828.

Amis vs. Smith, 16 Peters, 303, 1842.

Defining what is part of "final process" and "proceedings" thereon, the Court in this case says:

"We think this section (§ 3) of the Act of 1828 adopted the forthcoming bond in Mississippi as part of the final process of that State at the passage of the act. And we understand by the phrase 'final process,' all the writs of execution then in use in the State courts of Mississippi which are properly applicable to the courts of the United States, and we understand the phrase 'the proceedings thereupon,' to mean the exercise of *all the duties of the ministerial officers of the States, prescribed by the laws of the State, for the purpose of obtaining the fruits of judgment*" (pp. 312, 313).

See, also, on this point, Beers vs. Haughton, *supra*, and extract there given.

So it was held in a subsequent case that the Process Act, 1828, adopted the existing statutes of Mississippi that if a Sheriff fails to pay over on demand money collected on execution, he and his sureties may on *motion* be compelled to pay the same, but that the penal clauses of the State Act were not adopted.

Gwin vs. Breedlove, 2 How., 16, 1844.
S. P., Hiriart vs. Ballou, 9 Pet., 156, 1835.

As it thus appears that the giving of a stay bond is

part of the remedy to enforce the judgment, there can be no claim that it constitutes a RULE OF PROPERTY, not affected by the Process Acts, such, *e. g.*, as was the case in Brine vs. Ins. Co. (96 U. S., 627, 1877, which decides that,

A State statute giving a *mortgagor of realty the* right to redeem for twelve months after foreclosure sale, confers a substantial *property right* relating to the alienation of lands (a subject within the exclusive control of the States) and also a *contract right*, and hence is a rule of property, and as such is binding upon the Federal Courts and beyond their power substantially to affect or impair by rule or otherwise. Hence, the Redemption Act of Illinois of 1841 as to mortgages subsequently executed is binding upon the Federal Courts in that State as a rule of property.

The Process Acts do not apply to such a case, and are not even referred to in Justice MILLER'S opinion in the case.

Ross vs. Duval (13 Pet., 45, 1839), and *Ward vs. Chamberlain* (2 Black, 440, are other instances of rights which were rules of property, as distinguished from proceedings under executions.

The Stay Bond and the judgment and execution thereon were unauthorized and void.

IT WOULD SEEM TO NEED NO ARGUMENT to show if the Nebraska Stay Act of February 23, 1875, was not applicable to judgments in the Federal Court on December 2, 1875, when the Stay bond in question was approved, recorded and indexed by the Clerk; that the Clerk's

action in respect thereof was simply nugatory, and did not affect or vary the legal rights of the judgment creditor, who was notwithstanding entitled to an immediate execution.

The ministerial act of the Clerk, in pursuance of section 6 of the Nebraska Stay Act, in entering the bond of record and indexing the judgment, or the provisions of this section of the State Act that such recorded bond "shall have the force and effect of a judgment from the date thereof against the property of the sureties,' is because unauthorized, of no legal consequence whatever (*Amis vs. Smith*, 16 Pet., 304).

If after this the Clerk had, on demand of the judgment creditor, refused to issue a *fi fa* within the nine months, the creditor's remedy was to apply to the Court for an order on the Clerk to issue the writ, to which order the creditor was legally entitled.

BONDS OF THIS CHARACTER, are wholly statutory and depend for their validity upon legal right to give them, and upon their legal effect when given.

The decisions in *Wayman vs. Southard* and *Bank vs. Halstead* (10 Wheat. 1, 51), quashing stay bonds and appraisement proceedings under State laws, because inapplicable to executions in the Federal Courts, are directly in point as to the utter invalidity of the stay bond in question in this case.

So, in *Ross vs. Duval* (13 Pet., 45, 1839), because the Circuit Court entered a judgment on a forthcoming bond, whereby the judgment debtor and a surety stipulated "for the delivery of property on the day

and place of sale," when the execution on which said forthcoming bond had been taken was issued after the right to issue it was barred, the Supreme Court of the United States reversed the judgment for the sole reason that the forthcoming bond was unauthorized and void and could not be the foundation of a judgment thereon.

Even if the stay bond in question could be sustained as a COMMON LAW BOND, a judgment entered thereon by the Clerk *ministerially*, would be void, as well as any execution thereon. As a common law bond, it could only be enforced by a regular action thereon in the Courts.

IN ALL EXECUTION SALES the validity thereof depends upon a valid judgment and valid execution. It is a question of power.

In *Gantley's Lessee vs. Ewing* (3 Howard, 707, 714, 715), CATRON, J., delivering the opinion of the Court says :

"At common law the fee in lands by a *fieri facias* is not subject to sale ; the sheriff's authority to sell in this country is in the nature of a naked power conferred by statute ; he takes no title in the land by the levy, as he does in goods, and can confer none on the purchaser if the power is wanting * * * To treat a bidder at the sale [by the sheriff] in any of its stages, as an innocent purchaser, we think would be dealing with him in a manner too indulgent. * * * *This is a question of power*," &c.

In Mr. DOANE'S Brief many authorities cited (p. 18).

II.

The Court erred in refusing defendant's instruction No. IV. (p. 30), and in giving the plaintiff's converse instruction No. I. (p. 31), thereby directing the jury to hold the stay bond to be the defendant's ACT AND DEED, even though, when approved by the clerk, the same was not perfect, as the defendant's name had been visibly cut from the affidavit of justification which the statute imperatively required, and the appearance of the bond changed and mutilated. The Court especially erred in not submitting to the jury, on the evidence, the question whether "the bond had been delivered as the bond of the defendant" (Record, p. 30), and in directing the jury to disregard the testimony of the defendant and his brother (p. 31).

The evidence that the bond had been thus defaced and mutilated before it was presented to the Clerk by or on behalf of the other obligors was ample and undisputed.

Defendant's Evidence, p. 25.
His brother's Evidence, pp. 26, 27.

No contrary evidence was given or offered.

The Nebraska Stay Act expressly provides:

"SEC. 4. Officers approving stay bonds shall require the affidavits of the signers of such bonds that they own real estate not exempt from execution, and aside

from incumbrance, to the value of twice the amount of the judgment."

"SEC. 6. The sureties for the stay of execution may be taken and approved by the clerk," &c.

It is submitted that this statute contemplates that the affiants shall appear personally before the Clerk and make the affidavit before him or in his presence, prior to his approval of the bond.

For it says that "the officers approving stay bonds shall require the affidavits of the signers" and that the "sureties may be taken * * * by the clerk."

But, however this may be, the Statute (Sec. 4) is mandatory and imperative that the clerk

"*shall* require the affidavits of the signers that they own real estate to the value of twice the amount of the judgment."

Such affidavit is *jurisdictional* to the clerk's power. The clerk's approval of a bond without any affidavits would be void; and the judgment creditor's right to an immediate execution would not be stayed thereby. The judgment in this case was for $6,500; and the four sureties other than the defendant justified in the aggregate sum of $68,000. Prior to the trial the clerk had died, and the defendant offered to prove by a witness the clerk's statement that "in approving the bond he noticed the fact that the justification of the defendant had been removed from the bond and that he (the clerk) did not consider the name of the defendant in approving the bond" (page 27). This evidence was excluded and the defendant excepted. The declarant being dead and being the only person having full knowl-

edge of the facts declared; the declarations being made in the course of official duty, and against his interest (being an admission that he knew he neglected his official duty in approving the bond without an affidavit), it is submitted that the offered testimony was competent and that its rejection was error. 1 Greenl., Ev. Secs. 147, 148; County Mahaska vs. Ingalls, 16 Iowa, 81, where the authorities are collected and reviewed. Followed, Scott Co. vs. Fluke, 34 Iowa, 317; Taylor's Ev., Secs. 668–672. The clerk being dead it was the best possible evidence attainable. If true, the whole basis of an estoppel against the defendant was gone. But aside from this, when such mutilated, and as to the defendant, imperfect, bond was presented to the clerk, he was either bound to disregard the defendant's signature and approve the bond, if at all, irrespective of the defendant's name or else make inquiry of the defendant why he had not justified and why his justification had been removed. Shortly, we insist that the requirements of the statute in connection with the imperfect and mutilated bond put the clerk upon notice and obliged him to make inquiry of the defendant why his justification had been removed and to insist upon the affidavit, required by the statute, from the defendant.

The defendant, before the delivery of the bond to the clerk, notified John Irwin, the person who had possession thereof, that he wished to take his name off, and received it from him for that purpose, and the light being dim, by *mistake* he cut his name off from the affidavit of justification instead of from the body of the bond, and he never knew to the contrary until his prop-

erty was advertised for sale by the Marshal in 1881 (Record, pp. 25, 26).

It is, therefore, plain that he did not intend to be bound, and supposed he had removed his name from the bond. In point of fact he did not consent to be bound, and it was by a pure *mistake* and against his intention that his name was left on it. *After that Irwin ceased to be the defendant's agent to deliver the bond for the defendant, on any terms or conditions whatever.* He was not defendant's agent for any purpose; and it is not a queestion, if he had been such agent, what were his apparent, as distinguisned from his real, powers. There is no element of agency in the case.

If, therefore, the defendant is bound, it is not because he agreed to be bound or because the bond was delivered to the clerk with his name upon it *with his authority*, or by any agent of his, but because, though delivered without his authority, he is *estopped* as against the judgment creditor to deny the execution and delivery of the bond. In other words, the basis of the supposed liability is an *estoppel in pais* or equitable estoppel. It was on this ground that the Court below put the liability of the defendant in the instruction to the jury asked by the plaintiff (Record, p. 31, Instruction 1), and in denying the instruction asked by the defendant (p. 30).

We insist with confidence that the case is not one that falls within the principle of equitable estoppel, properly understood and applied.

1. Under the Statute the bond was not *regular in form nor apparently perfect*, but on the contrary it was visibly mutilated and legally defective as to the defendant, in respect of particulars as to which it was the

official duty of the clerk to take notice and cause to be perfected.

The fair inference under the circumstances, is, that the Clerk did not *rely* upon the defendant's name, and, if so, the whole basis for an estoppel is wanting. At all events, it is enough to prevent the application of the principle of equitable estoppel in such cases, that the obligee, or in this case, the clerk, had *notice* of facts or circumstances which put him upon inquiry. *If the clerk had conformed to the law and done his official duty by requiring defendant's affidavit, the fact would have been discovered that the defendant had not agreed to become surety.* Any loss or damage to the judgment creditor, was proximately occasioned by the clerk's neglect to do his duty, if he approved the bond on the strength of the defendant's name being thereon. The circumstances show, and the defendant offered to prove, that the clerk's approval of the bond was not based upon or influenced by the defendant's signature. This matter ought to have been left to the jury as defendant prayed (Instruction IV., p. 30), and not taken from them by the Court, as it did, by giving the plaintiff's instruction (Record, p. 31, Instruction 1), and by its own peremptory charge to find for the plaintiff (p. 31). On the point as to duty to submit to the jury, see Dyer vs. Pearson, 3 B. & C., 38; Johnson vs. Credit Lyonnais Co., L. R., 3 C. P. Div., p. 38.

Every case of equitable estoppel, where negligence is an element, depends upon its own circumstances and not upon any cast-iron rule such as was, at the plaintiff's instance, put to the jury ,excluding the defendant's evidence and peremptorily directing a verdict for the plaintiff (Record, p. 31).

THIS CASE, for the reasons above urged, IS CLEARLY DISTINGUISHABLE from *Dair vs. United States* (16 Wall., 1), and *Butler vs. United States* (21 Wall., 272). It falls within the principle of Paulding vs. United States (4 Cranch, 219), which principle is admitted to be correct in *Dair vs. United States.* In *Dair vs. United States,* the defense of the surety was, that the "bond was not to be delivered to the plaintiff until it should be executed by one Joseph Cloud as co-surety," which was not done.

The express finding of the Court was that the bond, as delivered,

was, in all respects, regular on its face, and that the plaintiff had no notice of the condition."

In the Opinion it is said (page 4) :

"Why should not this principle of estoppel, on every reason of justice and good faith, be applied to the covenant on which this action is founded. *The bond was in all respects regular,* executed according to prescribed forms, and accepted by the officer whose duty it was to take it as a completed contract. *There was nothing on the face of the paper, or in the transaction itself, to put the officer on inquiry, or to raise even a suspicion in his mind that a condition was annexed to the delivery of the instrument.* * * * The cause of *Paulding et al. vs. The United* has been cited as an authority against the position taken in this case; but it is not so, because the additional securities to be procured in that case were named on the face of the bond, and this fact is stated in the plea. *If the name of Joseph Cloud appeared as a co-surety on the face of the bond, the estoppel would noi apply, for the reason that the incompleteness of the instrument would have been brought to the notice of the agent of the Government who would have been put on inquiry to ascertain why Cloud did not execute it, and the pursuit of this inquiry would have disclosed to him the exact condition of things.* In any case, if the bond is so written that it appears that several were expected to sign it, the

obligee takes it with notice that the obligors who do sign it can set up in defense the want of execution by the others, if they agreed to become bound, only on condition that the other co-sureties joined in the execution."

The case of *Butler vs. United* was like Dair's case. This Court said: "We cannot distinguish this case, in principle, from *Dair vs. United States.*"

2. Besides the statutory defect in this bond, so far as it related to the defendant and aside from the failure and neglect of the clerk to require it to be perfected, *the case is not within the reason and principle of equitable estoppel* as that doctrine is expounded in the best considered adjudications in England and this country.

I DO NOT PROPOSE TO GO INTO THE WIDE FIELD OF EQUITABLE ESTOPPEL, as each case rests largely upon its own circumstances, but only to point out that this case does not fall within the established principles on that subject, and leave its examination to the Court. Mr. BIGELOW (Estoppel, Chapter 18) discusses the cases with great fullness and ability.

The onus is on the party seeking to establish an estoppel, or exclude a defense which is valid under the ordinary rules of law, to produce specific proof of elements essential to the estoppel.

Hall vs. Purnell, 2 Md. Ch., 137.
Weaver vs. Lynch, 25 Pa. St., 449.
Martin vs. Richter, 10 N. J. Eq., 510.

Again, " estoppels are odious, and the doctrine should never be applied without a necessity for it."

Baxendale vs. Bennett, L. R., 3 Q. B. Div., p. 529, 1878.

" Estoppels are certainly entitled to no peculiar favor."

Hanrahan vs. O'Reilly, 102 Mass., 201, 204, 1869.

This principle was disregarded in the instructions of the Circuit Court.

In this case there are three reasons why equitable estoppel does not apply: FIRST, the circumstances negative any *reliance* by the clerk on the defendant's name. SECOND, there never was any *intention* on the part of Lamaster that the other party (the clerk) should act upon his representation in the bond; his failure to remove his signature resulted from pure *mistake*. THIRD, the use of his signature by Irwin, his co-signor, who had the possession of the bond, was a *fraud* of the grossest character on the defendant, and in such cases the doctrine of equitable estoppel does not apply, at least unless the obligee is wholly free from blame or negligence. In the leading case of Pickard vs. Sears (6 Adolphus and Ellis, 469), Lord DENMAN laid down the law that the jury must be satisfied that the plaintiff had " willfully " caused the defendants to believe that he had no claim upon the property and thereby induced them to purchase. The word " willfully " was afterwards explained in *Freeman vs. Cooke* (2 Exch., 663) as follows:

" By willfully we must understand if not that the party represents that to be true which he knows to be untrue, at least that he *means* his representation to be acted upon and that it is acted upon accordingly."

The element of *meaning* that his representation should be acted upon, or, as it is elsewhere expressed, that it was made with *express intention* of influencing the conduct of another, has never been departed from in any well-considered casein England or in this country.

See following cases :

Welland Canal vs. Hathaway, 8 Wend., 483.
S. P., Baker vs. Ins. Co., 43 N. Y., p. 289.
Payne vs. Burnham, 62 N. Y., 69, 73.
Brown vs. Bowen, 30 N. Y., 541.
S. P., Harnahan vs. O'Reilly, 102 Mass., 201.
Trenton Banking Company vs. Duncan, 86 N. Y., 221, 230.
Andrews vs. Lyon, 11 Allen (Mass.), 349.
Turner vs. Coffin, 12 Allen (Mass.), 401.
See, also, late English cases cited, *infra.*

So where the paper containing the misrepresentation relied on as an estoppel was procured by fraud, the doctrine of equitable estoppel, by reason of such paper, does not apply.

Wilcox vs. Howell, 44 N. Y., 398 (a strong and pointed illustration).

Doctrine of Supreme Court United States :

Generally, there must be some intended deception in the conduct or declaration of the party to be estopped, or such gross carelessness on his part as to amount to constructive fraud, and the other party must have been free from *laches* or want of care.

Henshaw vs. Bissell, 18 Wall., 271, where FIELD, J., summarizes the doctrine.
S. P., Trenton Banking Co. vs. Duncan, 86 N. Y., 230.

"Culpable negligence" is, in such cases, necessary to conclude the defendant on the ground of estoppel (Carr vs. London, &c., Ry. Co., L. R., 10 C. P., 307, 318). And even then he is not estopped, unless it is the direct cause of the injury and the other party is free from *laches* or want of care (see Cases *supra* and *infra* on this point).

Hence, there is no estoppel from *innocent mistake.*

Illustration :

Brewer vs. R. R. Co., 5 Met., 478.

Even if it can be supposed or inferred that the clerk *relied on the defendant's name* in approving the bond, two other things would be essential to estop the defendant on the ground of negligence in leaving the bond in Irwin's possession :

1st. The defendant's negligence must be the "proximate or effective cause of the fraud," and it must be "culpable negligence." Here the proximate and effective cause of the injury was the clerk's omission of an official duty pertaining to the approval of the bond. Here, also, there was no culpable negligence on the part of the defendant.

2d. The clerk must have acted, in approving the bond, "with reasonable care and attention to prevent being misled." Here, the clerk failed to exercise reasonable care and attention. In fact, if he relied on the defendant's name (which is not probable), he did so in violation of official duty. See on these points :

Carr vs. London, &c., Ry. Co., L. R., 10 C. P., 307, 1875. See pp. 316–318.

Johnson vs. Credit Lyonnais Co., L. R., 3 C. P. Div., 32, 1877. See p. 40 for statement by COCKBURN, C. J., of the doctrine of *Pickard vs. Sears* and *Freeman vs. Cooke.*

In all such cases it is essential he says :

" that knowledge of the thing done be brought home
" ' to the defendant.'

" It would be to carry this doctrine [of estoppel] much too far to apply it where advantage has been taken of a man's remissness in looking after his own interests, to invade or encroach upon his rights, in the absence of knowledge on his part of the thing done, from which his assent to it could reasonably be implied."

Although estoppel is more freely applied to commercial paper than to sealed instruments, yet it was held in *Baxendale vs. Bennet*, L. R., 3 Q. B. Div., 525 (1878), that there was no estoppel in favor of an endorsee for value against the acceptor of a lost blank acceptance, under the following circumstances :

The defendant gave H. his blank acceptance on a stamped paper, and authorized H. to fill in his name as drawer. H. returned the blank acceptance to the defendant in the same state in which he received it. The defendant put it into a drawer of his writing table at his chambers, which was unlocked, and it was lost or stolen. C. afterwards filled in his own name without the defendant's authority, and an action was brought on it by the plaintiff as indorsee for value.

BRETT, L. J. (p. 531), says :

"In this case, it is true that the defendant after writing his name across the stamped paper sent it to another person to be used. When he sent it to that person, if he had filled it in to any amount that the stamp would cover, the defendant would be liable, because he sent it with the *intention* that it should be acted upon ; *but it was sent back to the defendant, and he was then in the same condition as if he had never issued the acceptance.* The case is this : The defendant accepts a bill and puts it in his drawer, it is as if he had never issued it with the intention that it should be filled up ; it is, as if after having accepted the bill, he

had left it in his room for a moment and a thief came in and stole it. *He has never intended that the bill should be filled up by anybody, and no person was his agent to fill it up.*"

And the same learned Judge in the same case, thus comments upon the case of *Ingham vs. Primrose*, 7 C. B. (N. S.), 82:

"In *Ingham vs. Primrose*, the acceptor of a bill of exchange, with the intention of canceling it, tore it into two pieces, and threw them into the street, they were picked up by the indorser, joined together, and the bill was put into circulation. The acceptor was held liable, because, said the Court, although he did intend to cancel it, yet he did not cancel it. It seems to me difficult to support that case, and the correct mode of dealing with it is to say we do not agree with it."

III.

The order of the Court overruling the defendant's motion to set aside the sale, and confirming the sale, and ordering the Marshal to execute a deed is not an estoppel of record upon the defendant.

THE EXECUTION SALE was made by the Marshal in the usual form on the 17th of May, 1881 (Record, p. 35); and promptly at the next Term the defendant made a Motion to set aside the sale and for the reasons specified therein (Record, pp. 36, 37). The defendant supported this motion by his affidavit (Record, pp, 45, 46), that before the delivery of the said stay bond to the

clerk, he notified Irwin, the agent of the judgment debtor, who had the possession of the bond, that he wished to take his name from the bond and be no longer considered as a surety thereon, and removed his name from the justification attached to the bond, supposing that he had removed it from the bond, &c. This affidavit was stricken from the files and the motion was heard upon the papers only (Record, p. 47), that is to say, upon the execution and the Marshal's return thereon and the papers attached to said return, embodied in the bill of exceptions taken in that proceeding, and set forth in the record in this case (Record, pp. 38–49). I can hardly suppose that in this Court it will be seriously urged, or, perhaps, even suggested, that an order upon a mere motion, and which motion was based upon an affidavit as to extrinsic facts and which affidavit the creditor asked to strike from the case, which was done, can be pleaded as *res judicata* of the plaintiff's rights or of his title to the lot in controversy. It is not necessary to waste time on this point. There are conclusive reasons why this order can have no effect as a *judgment* which can be set up by way of estoppel or as a bar to the present suit. It is settled law that orders upon motions of this kind do not estop in any subsequent regular suit brought to determine the legal rights of the parties. The reasons for this are obvious: *First*, there are no regular pleadings or issues joined; *second*, no provision exists for taking testimony in the regular way; *third*, no writ of error will lie from an order based on such a motion because such an order is not a *judgment* and certainly in the Federal Court is not a *final judgment*, and writs of error only lie to judgments that are final. It has been so held in this Court.

The refusal of the Court to quash on motion a writ of execution or other final process, is not ground for a writ of error, *since it leaves every remedy which is of right, open to the party.* Such a decision is not a *judgment,* much less a *final judgment.*

Boyle vs. Zacharie, 6 Peters, 648, and cases cited by STORY, J., pp. 656, 657.

Observe the quotation on p. 656 from Chancellor KENT (Brooks vs. Hunt, 17 Johnson, 484), where he ridicules such a "mode of proceeding as that of a writ of error upon a motion and affidavit."

S. P. Amis vs. Smith, 16 Peters 303, 314.

In *Brooks vs. Hunt, supra,* the Court held that a writ of error would not lie to an order of the lower Court on a motion to set aside an execution. Chancellor KENT (17 Johnson, 486), says: "A writ of error, according to the uniform language and understanding of the law, will lie only upon a final judgment or determination of a cause, and it was never known to lie upon a motion to set aside process."

Although the defendant took a bill of exceptions to the order confirming the sale, it was useless to prosecute a writ of error, and it was not prosecuted. The proceeding shows, however, that the creditor and purchaser were advised from the beginning that the defendant would contest the sale, and the purchaser had full notice of the grounds of such contest and took his chances with his eyes wide open.

IV.

The prior and then depending suit in the State Court, in respect of the title to the same property, was a defense to the prosecution of this suit in the Federal Court, and the instructions of the Court below to the contrary were erroneous. By such suit the State Court obtained the prior jurisdiction of the parties and of subject of controversy, and the exclusive right to determine it. The action, trial and judgment in the Federal Court was in plain disregard of the principles of comity towards the State Court, and of the legal rights of the plaintiff not to be subjected to double and parallel litigations, with possible conflicting judgments.

FACTS. This Record shows the following facts :

May 23, 1882. Lamaster, under the below mentioned provision of the Statute of Nebraska in relation to actions to quiet titles, filed in the State Court his petition against Thomas Ewing (who was the purchaser at the Marshal's sale and the grantee in the Marshal's deed, and the subsequent grantor of Keeler), setting up the plaintiff's title to the *specific lot* here in question; the defendant's (Ewing's) alleged title under the Marshal's sale and deed; that such title was invalid, null and void, and praying judgment that the plaintiff's title be quieted, &c.

Record, pp. 65–68.

June 19, 1882. Ewing answered to the merits and set up his title under the Marshal's deed.

Record, pp. 68–72.

July 7, 1882. Plaintiff (Lamaster) replied, and the cause was at issue.

It involved, as will be seen by the record thereof (pp. 65–73), every question that was involved in this present cause, and no others.

July 17, 1882. *Ewing* (the defendant in the State Court suit) conveyed the lot here in question to *Keeler* (the present defendant in error in this suit).

Record, pp. 50–51 (text of deed).

July 17, 1882. Same day on which *Keeler* obtained his deed, he commenced the present suit against *Lamaster* in the U. S. Circuit Court for Nebraska.

Record, pp. 1, 3.

THE ANSWER to this suit in the Federal Court pleaded, *inter alia*, the suit in the State Court as a defense, and asked that the action in the Federal Court be dismissed.

Record, p. 12.

ON THE TRIAL of this action in the Circuit Court the defendant proved the pendency at that time of the suit in the State Court (p. 29), and introduced in evidence the *record of that suit* (p. 29) and the pleadings therein.

Record, pp. 65–73.

STATUTES. The State of Nebraska has adopted a CODE OF CIVIL PROCEDURE which provides for uniformity of pleadings and procedure in all civil actions, and

allows and requires all matters legal and equitable pertaining to a single cause of action to be litigated in one suit (Compiled Stats. Neb., 1887, pp. 753, 754). The sections here applicable are the following:

Code, Sec. 91. (*Pleadings allowed.*) THE *only pleadings allowed are:* First. The petition by the plaintiff. Second. The answer or demurrer by the defendant. Third. The demurrer, or reply by the plaintiff. Fourth. The demurrer to the reply, by the defendant.

Sec. 94. (*Demurrer—Grounds of*). The defendant may demur to the petition only when it appears on its face: Either—First. That the Court has no jurisdiction of the person of the defendant, or the subject of the action. Second. That the plaintiff has not legal capacity to sue. Third. That there is another action pending between the same parties for the same cause. Fourth. That there is a defect of parties, plaintiff or defendant. Fifth. That several causes of action are improperly joined. Sixth. That the petition does not state facts sufficient to constitute a cause of action.

Sec. 96. (*Waiver—Jurisdiction*—No cause of action). When any of the defects enumerated in section ninety-four do not appear upon the face of the petition, the objection may be taken by answer; and if no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the Court, and that the petition does not state facts sufficient to constitute a cause of action.

SEC. 99. (Contents.) The answer shall contain:

First. A general or specific denial of each material allegation of the petition controverted by the defendant.

Second. A statement of any new matter constituting a defense, counterclaim or set-off, in ordinary and concise language, and without repetition.

SEC. 100. (Several grounds of defense.) The defendant may set forth in his answer as many grounds of defense, counterclaim and set-off as he may have. Each must be separately stated and numbered, and

they must refer in an intelligible manner to the cause of action which they are intended to answer.

In the Compiled Statutes of Nebraska, 1887, p. 580, are the following provisions as to actions to QUIET TITLE, under which the suit in the State Court was brought, and which were in force when that suit was commenced, viz. :

SEC. 57. (*Action to quiet title.*) That an action may be brought and prosecuted to final decree, judgment or order, by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons who claim an adverse estate or interest therein, for the purpose of determining such estate or interest, and quieting the title of said real estate (G. S., Sec. I, 882).

SEC. 58. (*Pleadings, procedure.*) All such pleadings and proofs and subsequent proceedings shall be had in such action now pending or hereafter brought, as may be necessary to fully settle and determine the question of title between the parties to said real estate, and to decree the title to the same or any part thereof, to the party entitled thereto; and the Court may issue the appropriate order to carry such decree, judgment or order into effect (*Id.*, Sec. 2).

The plaintiff asked the following instruction, which was given, and excepted to by the defendant, viz. :

"IV. The pendency of the alleged action between Lamasters and Ewing in the State Court does not abate this suit or prevent in any wise the plaintiff from prosecuting the same."

Record, p. 32.

The defendant asked the following instruction, which was refused, and the refusal excepted to, viz. :

"VIII. The record introduced in evidence tends to show that at the time of the commencement of this action there was pending in the District Court for Lancaster County, in this State, an action between the de-

fendant herein as plaintiff and Thomas Ewing the grantor of Keeler, the present plaintiff, involving and requiring the determination of the same issue of title as herein involved, and if you find that this was so, and that the plaintiff obtained the conveyance in question from Ewing pending the same action in the State Court, and that the same is still pending, this is sufficient to abate the present action, and you should so find."

Record, p. 31.

UPON THE LEGISLATION of Nebraska above referred to, and upon the facts above appearing, I submit the FOLLOWING PROPOSITIONS as sound :

A. That as the suit in the State Court was an authorized suit in equity relating to the title to this particular lot and brought to determine the rights of the parties thereto, and was adequate for that purpose, the State Court acquired the prior and exclusive jurisdiction to determine the controversy, and it was error in the Court below to have held otherwise.

But if the forgoing proposition is not sound, then it is submitted

B. That the pendency of the suit in the State Court of the same district had the effect to abate, if not to bar, the subsequent action in the Federal Court.

A.

IF THE STATE COURT HAD HAD THE ACTUAL PRIOR CUSTODY OF THE PROPERTY, it would be beyond dispute that its jurisdiction would be exclusive and that the U. S. Circuit Court would have had no jurisdiction.

Peale vs. Phipps, 14 How., 368, 1852. Approved and applied in Barton vs. Barbour, 104 U. S., 126, 1881, cited *infra* in this argument.

Wiswall vs. Sampson, 14 How. (U. S.), 52, is an important and leading case.

In *Taylor vs. Carryl*, 20 How., 583, the head-note prepared by Mr. Justice MILLER, 2 Miller's U. S. Supreme Court Decisions, pp. 616, 617, is as follows :

"1. Where a vessel has been seized under process of attachment in a State Court, and is in the actual custody of the Sheriff, no valid seizure can be made of her so as to give jurisdiction in proceedings *in rem* in the District Court of the United States sitting in Admiralty.

"2. Consequently where a vessel was sold under the attachment proceeding, having been in the actual custody of the Sheriff until sale, and was *afterwards* sold under the decree of the Admiralty Court, the title was in the purchaser under the attachment proceeding (see Freeman vs. Howe, 24 How., 450; Buck vs. Colbath, 3 Wall., 334)."

In *Freeman vs. Howe* (24 Howard, 450) it is said :

Opinion, NELSON, J., (24 How., p. 457) : "We agree with Mr. Justice GRIER, in Peck *et al.* vs. Jenniss *et al.* (7 How., 624–5). "It is a doctrine of law too long established to require citation of authorities that *where a court has jurisdiction it has the right to decide every question which occurs in the cause*, and whether its decision be correct or otherwise its judgment, till reversed, is regarded as binding in every Court; *and that where the jurisdiction of a court, and the right of a plaintiff in it have once attached, that right cannot be arrested or taken away by proceedings in another Court.*" "Neither can one take the property from the custody of the other by replevin, or any other process; for this would produce a conflict extremely embarrassing to the administration of justice."

In *Buck vs. Colbath*, 3 Wall., 334, 1865, it was held that a third person *not a party to the suit in the Federal Court* might sue the U. S. Marshal in trespass for taking goods under a general writ of attachment *which described no particular goods*, and where the Marshal in his plea did not allege that they were the goods of the defendants in the writ of attachment.

"With reference to this question" says the headnotes, which is accurate, "all writs and processes of the courts may be divided into two classes:

I. Those which point out specifically the property or thing to be seized.

II. Those which command the officer to make or levy certain sums of money out of property of a party named.

The rule that among courts of concurrent jurisdiction, the one which first obtains jurisdiction of a case has the exclusive right to decide every question arising in the case, is subject *to some limitations*, and is *confined to suits between the same parties, or privies, seeking the same relief or remedy, and to such questions or propositions as arise ordinarily and properly in the progress of the suit first brought*, and does not extend to all matters which may by possibility become involved in it." (3 Wall., 334, 342–344.)

See also Krippendorf vs. Hyde, 110 U. S., 276, 1883.

Now a suit in Chancery claiming the title to specific property which is described in the bill gives the Court jurisdiction over such property equivalent in legal effect to actual custody.

The case of *Boswell's Lessee vs. Otis*, 9 How. (U. S.), 336, 1849 (cited and approved in Heidritter vs. Elizabeth Oil Cloth Co., 112 U. S., 301, 1884, cited *infra*), distinctly holds *that filing a bill in equity claiming spe-*

cific property or rights and equities in specific property described in the bill, viz., lot No. nine (9) in that case, *gives the Court jurisdiction over such property and suit*, although there is no attachment, and that such a suit is substantially a proceeding *in rem*, and the property so described is within the dominion and control of the Court, and its judgment in relation to such property even upon constructive service of process, is valid and binding upon the parties and the property.

The Court says: "It is immaterial whether the proceeding against the property be by an attachment OR BILL IN CHANCERY. A bill for the specific execution of a contract to convey real estate is not strictly a proceeding *in rem* in ordinary cases; but when such proceeding is authorized by statute, on publication, without personal service of process, it is substantally of that character" (p. 348).

In *Heidretter vs. Elizabeth Oil Cloth Co.*, 112 U. S., 294, 1884, the distillery premises of one Sicher, the owner, were seized by the U. S. Marshal, January 24, 1873, for violation of the internal revenue laws. Heidretter was a material man, and furnished materials for the building of the distillery, which under the mechanics' lien laws of New Jersey gave him a lien from the time of the commencement of the building. After the Marshal's seizure Heidretter duly filed his lien and commenced suit in the State Court to enforce it, and served his process by publication and *made no attempt to interfere with the Marshal's possession of the property.*

The property was condemned by decree of U. S. Court, and sold, conveyed and delivered by the Marshal to the grantor of the Oil Cloth Company. *After such sale and delivery to the purchaser*, and when, therefore,

the property was no longer in the possession of the United States Court or its officer or of the law, it was sold and conveyed by the Sheriff to Heidretter, under his judgment for a mechanics' lien rendered by the State Court. It was held that such judgment, sale and conveyance were "vain, nugatory and void," on the ground that "the property involving the control and disposition of it was withdrawn from the jurisdiction of the Courts of New Jersey" (p. 302).

Mr. Justice MATTHEWS, delivering the opinion of the whole Court, stated at p. 305 the basis of this doctrine with great force and clearness.

He said, *inter alia :*

"This view, though decisive of the case and resulting in the affirmance of the judgment of the Circuit Court, proceeds upon assumptions the most favorable which can be indulged to the plaintiff in error. It is merely an application of the familiar and necessary rule, so often applied, which governs the relations of courts or concurrent jurisdiction, where, as is the case here, it concerns those of a State and of the United States, constituted by the authority of distinct governments, though exercising jurisdiction over the same territory. That rule has no reference to the supremacy of one tribunal over the other, nor to the superiority in rank of the respective claims, in behalf of which the conflicting jurisdictions are invoked. *It simply requires, as a matter of necessity, and, therefore, of comity,* THAT WHEN THE OBJECT OF THE ACTION REQUIRES THE CONTROL AND DOMINION OF THE PROPERTY INVOLVED IN THE LITIGATION, THAT COURT WHICH FIRST ACQUIRES POSSESSION, OR THAT DOMINION WHICH IS EQUIVALENT, DRAWS TO ITSELF THE EXCLUSIVE RIGHT TO DISPOSE OF IT FOR THE PURPOSES OF ITS JURISDICTION."

And the Court in that case held that "*the mere bringing of a suit in which the claim is sought to be enforced, may by law be equivalent to a seizure, being the open and public exercise of dominion over it for the purpose of the*

suit" (p. 302); and citing as establishing this point Cooper vs. Reynolds, 10 Wall., 308, 317, where a mere levy on real estate without service of process on the defendant, either personally or by publication, gave the Court jurisdiction over the property, being "acts which are of equivalent import with a seizure, and which stand for and represent the dominion of the Court over the thing and in effect subject it to the control of the Court," MILLER, J. (10 Wall., *supra*, p. 317), and also citing *Boswell's Lessee vs. Otis* (9 How., 336), referred to above.

In *Barton vs. Barbour*, 104 U. S., 126, 1881, Barton, a passenger injured by alleged negligence, sued, in the Supreme Court of the District of Columbia, Barbour as Receiver of the Virginia Midland Railway Company, duly appointed by a Court of Virginia, to recover $5,000 damages. Barbour pleaded to the jurisdiction of the Court, the suit having been brought without leave of the Court by which he was appointed. HELD, that the rule that *a Receiver* cannot be sued without leave of the court of equity which appointed him *applies to suits against him on a money demand*, as well as to those the object of which is to recover the property which he holds by order of that Court. Citing and affirming *Wiswall vs. Sampson*, *supra* (14 How., 52), as deciding this point (p. 129).

HELD, also, that suing without such leave did not simply subject the plaintiff to liability to be attached for contempt, BUT WAS A JURISDICTIONAL FACT; which point the Court held settled in *Peale vs. Phipps*, *supra* (14 How., 368).

In Bispham Eq., Sec. 414, it is said: "*After a court of equity has once got possession of a cause, it will not suffer any of the litigating parties to resort to another*

tribunal. Either the plaintiff or defendant who attempts to do so may be restrained by motion in the cause."
Schoole vs. Sall, 1 Sch. & Lef., 176.
Taylor vs. Waters, 1 Myl. & C., 266.
Kerr on Inj., 106.

Whenever the Circuit Court of the United States has jurisdiction, either originally or by removal from the State Court, of a suit in equity, it will enjoin a party to such suit from commencing or prosecuting a subsequent suit relating to the same matter in a *State* Court against another party to the equity case; and the statute of the United States (Rev. Stats., § 720) that "a writ of injunction shall not be granted to stay proceedings in any Court of a State" has no application to such a case. The foregoing propositions were distinctly decided by the Supreme Court of the United States in *French, Trustee, vs. Hay*, 22 Wall., 250, 1874.

In this case the suit in equity related to the respective rights of French, Trustee, on the one hand, and the rights and liabilities of Stewart and Hay on the other, in respect of a house and lot in Alexandria, Virginia. *There was no injunction or receiver;* and the bill of French was to settle the title and for an account from Stewart and Hay in respect of rents of the house. December 23, 1869, the State Court rendered a decree *pro confesso* against Hay for $2,389 (p. 243), without jurisdiction as to Hay. On 8th February, 1870, the cause was removed by Hay and Stewart to the U. S. Circuit Court; but on the 3d of February, 1870, *i. e.*, five days before the removal of the case, French sued Hay in one of the State Courts of Pennsylvania on the decree for $2,389, *supra*. Hay went into the U. S. Circuit Court, and asked and obtained an injunction

" to restrain French from proceeding further in Pennsylvania or elsewhere to collect " the decree for $2,389, which injunction was made perpetual in the final decree (p. 251).

This was affirmed by the Supreme Court of the United States.

Mr. Justice SWAYNE, delivering the opinion of the Court, said :

" This bill is not an original one. It is auxiliary and dependent in its character, as much so as if it were a bill of review. The Court having jurisdiction *in personam*, had power to require the defendant to do or to refrain from doing anything beyond the limits of its territorial jurisdiction which it might have required to be done or omitted within the limits of such territory. *Having the possession and jurisdiction of the case, that jurisdiction embraced everything in the case, and every question arising which could be determined in it until it reached its termination and the jurisdiction was exhausted. While the jurisdiction lasted* IT WAS EXCLUSIVE, *and could not be trenched upon by any other tribunal.*

SO, CONVERSELY, THE STATE COURT, in the cause at the bar, having first acquired jurisdiction, could have restrained *Ewing* or *Keeler* (as privy, *pendente lite*) from proceeding in the Federal Court, and the State Court may still proceed and adjudge the cause, notwithstanding the trial and judgment in the Federal Court.

KEELER, a purchaser *pendente lite*, is bound by the suit in the State Court whether made a party or not. The law makes him a party.

Story Eq. Jurisp., Sec. 405.

Keeler admits in his deposition (p. 56) that when he bought he had *actual notice* of the State Court suit. He is bound by the judgment or decree in the State Court

whether made a party or not. As to that suit his deed " is treated as if it never had any existence."

Story Eq., Sec. 406.

B.

At all events, at the very least, the State Court suit abated, if it did not bar, the action in the Federal Court.

I am aware that there are cases which hold that the mere fact of the *pendency of another suit in a* FOREIGN *State or in the Federal Court of* ANOTHER *State or District* is not a good plea in abatement or bar. But there is no case which holds, and, I submit, it is not the law, that the pendency of a prior suit in equity in the State Courts is not a good plea to a subsequent suit in the Federal Courts of the SAME district.

The subject is very clearly expounded by one of the ablest of the Federal Judges.

Brooks vs. Mills County, 4 Dillon, C. C. Rep., 524; and cases cited and reviewed by LOVE, J.; and see *Ib.*, p. 531, *note*, as to Mr. Justice MILLER'S opinion on the point.

I content myself on this point with the discussion in that case, to which the attention of the Court is asked. I submit it with confidence to the judgment of the Court. And even if only good in *abatement*, it was well pleaded under the Nebraska Statute and practice and duly insisted on at the trial. But it was good in *bar*.

" The plea of another suit depending in equity is clearly a good plea."

Story, Eq. Plead., Sec. 743.

But, whatever might be the view of this question, if this prior suit in the State Court was for a *mere money demand* which could only result in a *general judgment for money*, it is clear (as the authorities above referred to fully establish), when the prior suit *relates to specific property and is brought to settle rights, titles, liens or equities in respect thereto*, that such a suit, although no Receiver is appointed, is substantially a suit *in rem* and draws to the Court the exclusive right to adjudicate with reference to the matters and property in issue, which right no other Court can defeat or interfere with; and this is the settled rule as between the Federal and State Courts—a rule which rests, not upon comity or discretion or convenience, " but is a principle of right and of law, and, therefore, of necessity."

Covell vs. Heyman, 111 U. S., 176.
Heidritter vs. Eliz. Oil Cloth Co., *supra*.
Boswell's Lessee vs. Otis, 9 How., *supra*.
French vs. Hay, 22 Wall., *supra*.

V.

There was a special plea to the jurisdiction (Record, p. 5) and under the Nebraska Code (see sections quoted, ante), an answer to the jurisdiction (Record, pp. 9, 10) based upon the alleged fact that the conveyance, July 17, 1882, from Ewing to Keeler (both citizens of Nebraska), was colorable and collusive, and made only to enable the

plaintiff to bring suit in the Federal Court. The Court erred in peremptorily taking this question away from the jury (Record, p. 31).

Under the Nebraska Code, and Sec. 914 Rev. Stats., this question was not waived by the answer to the merits.

Nebraska Code, Secs. 91, 94, 96, 100, quoted *supra*.

THE EVIDENCE was sufficient to establish the fact, at all events, the question ought to have submitted to the jury.

A jury had once, if not twice, so found.

Record, p. 9, Verdict.
Record, pp. 14, 15, Verdict.

The evidence on this point was the deposition of the plaintiff himself, in connection with the circumstances.

Record, pp. 54–64.

From this deposition it appears that Ewing and Keeler were related (p. 63); Keeler lived distant from Lincoln; went to Lincoln at Ewing's instance; was a man of small means (p. 61); made no inquiry as to value of property before he bought (p. 60); bought on credit; admits *he knew the title was in litigation in the State* Court (p. 56 *et seq.*); that there was conversation that there would be a better chance in the Federal Court (Deposition, *passim*) and this suit was brought the same day—these and other circumstances were sufficient to require the question to be submitted to the jury.

THE SPECIAL FINDING (Record, p. 18) was not co-extensive with the plea or answer as to the colorable or collusive nature of the conveyance as made to give the Federal Court jurisdiction, and hence does not cure the error of the peremptory direction to find a general verdict for the plaintiff (p. 31).

JOHN F. DILLON,
For the Plaintiff in Error.

APPENDIX.

PROCESS ACT, SEPTEMBER 29, 1789 (1 STATS., 93.)

CHAP. XXI. *An Act to regulate Processes in the Courts of the United States.*

SEC. 2. *And be it further enacted*, That until further provision shall be made, and except where by this act or other statutes of the United States is otherwise provided, the forms of writs and executions, except their style, and modes of process and rates of fees, except fees to Judges, in the Circuit and District Courts, in suits at common law, shall be the same in each State respectively as are now used or allowed in the supreme courts of the same. And the forms and modes of proceedings in causes of equity, and of admiralty and maritime jurisdiction, shall be according to the course of the civil law; and the rates of fees the same as are or were last allowed by the States respectively in the Court exercising supreme jurisdiction in such causes. Provided, That on judgments in any of the cases aforesaid where different kinds of executions are issuable in succession, a *capias ad satisfaciendum*, being one, the plaintiff shall have his election to take out a *capias ad satisfaciendum* in the first instance, and be at liberty to pursue the same until a tender of the debt and costs in gold or silver shall be made.

SEC. 3. *And be it further enacted*, That this act shall continue in force until the end of the next session of Congress, and no longer.

Approved, September 29, 1789.

PROCESS ACT OF MAY 8, 1792 (1 STATS., 275).

CHAP. XXXVI. *An Act for regulating Processes in the Courts of the United States, and providing compensations for the Officers of the said Courts, and for Jurors and Witnesses.*

SEC. 2. *And be it further enacted*, That the forms of writs, executions and other process, except their style and the forms and modes of proceeding in suits in those of common law shall be the same as are now used in the said courts respectively, in pursuance of the act entitled "An act to regulate processes in the courts of the United States," in those of equity and in those of admiralty and maritime jurisdiction, according to the principles, rules and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law; except so far as may have been provided for by the act to establish the judicial courts of the United States; subject, however, to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the Supreme Court of the United States shall think proper from time to time, by rule to prescribe to any circuit or district court concerning the same. Provided that on judgments in any of the cases aforesaid, where different kinds of executions are issuable in succession, a *capias ad satisfaciendum* being one, the plaintiff shall have his election to take out a *capias ad satisfaciendum* in the first instance.

PROCESS ACT, MAY 19, 1828 (4 STATS., 278).

CHAP. LXVIII. *An act further to regulate processes in the Courts of the United States.*

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the forms of mesne process, except the style, and the forms and modes of proceeding in suits in the Courts of the United States, held in those States

admitted into the Union since the twenty-ninth day of September, in the year seventeen hundred and eighty-nine, in those of common law, shall be the same in each of the said States, respectively, as are now used in the highest court of original and general jurisdiction of the same, in proceedings in equity, according to the principles, rules and usages which belong to courts of equity, and in those of admiralty and maritime jurisdiction, according to the principles, rules and usages which belong to courts of admiralty, as contradistinguished from courts of common law, except so far as may have been otherwise provided for by acts of Congress; subject, however, to such alterations and additions as the said Courts of the United States respectively shall, in their discretion, deem expedient, or to such regulations as the Supreme Court of the United States shall think proper, from time to time, by rules, to prescribe to any circuit or district court concerning the same.

SEC. 3. *And be it further enacted*, That writs of execution and other final process issued on judgments and decrees rendered in any of the courts of the United States and the proceedings thereupon shall be the same, except their style, in each State respectively as are now used in the courts of such State, saving to the courts of the United States in those States in which there are not courts of equity, with the ordinary equity jurisdiction, the power of prescribing the mode of executing their decrees in equity by rules of court. Provided, however, that it shall be in the power of the courts, if they see fit in their discretion, by rules of court, so far to alter final process in said courts as to conform the same to any change which may be adopted by the legislatures of the respective States for the State courts.

ACT JUNE 1, 1872 (17 STATS., 196).

SEC. 5. That the practice, pleadings and forms and modes of proceeding in other than equity and admiralty causes in the Circuit and District Courts of the United States shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing

at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding: Provided, however, that nothing herein contained shall alter the rules of evidence under the laws of the United States, and as practiced in the courts thereof.

SEC. 6. That in common-law causes in the Circuit and District Courts of the United States the plaintiff shall be entitled to similar remedies, by attachment or other process against the property of the defendant, which are now provided for by the laws of the State in which such court is held, applicable to the courts of such State; and such Circuit or District Courts may, from time to time, by general rules, adopt such State laws as may be in force in the State in relation to attachments and other process; and the party recovering judgment in such cause shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided by the laws of the State within which said Circuit or District Courts shall be held in like causes, or which shall be adopted by rules as aforesaid: Provided, That similar preliminary affidavits or proofs, and similar security as required by such laws, shall be first furnished by the party seeking such attachment or other remedy.

REVISED STATUTES OF THE UNITED STATES, SECTIONS 914, 915, 916.

Sec. 914. *Other than equity and admiralty causes.* The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts shall conform as near as may be to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding.

Sec. 915. *Attachments.* In common-law causes in the circuit and district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are

now provided by the laws of the State in which such court is held for the courts thereof; and such circuit or district courts may, from time to time, by general rules, adopt such State laws as may be in force in the States where they are held in relation to attachment and other process; provided that similar preliminary affidavits or proofs and similar security, as required by such State laws, shall be first furnished by the party seeking such attachment or other remedy.

Sec. 916. *Execution in common law causes.* The party recovering a judgment in any common law cause in any circuit or district court shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the State in which such court is held or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court; and such courts may, from time to time, by general rules, adopt such State laws as may hereafter be in force in such State in relation to remedies upon judgments as aforesaid, by execution or otherwise.

NEBRASKA STAY ACT OF FEBRUARY 23, 1875.

AN ACT *to provide for stay of executions and orders of sale.*

Be it enacted by the Legislature of the State of Nebraska:

SEC. 1. Hereafter no stay of execution or order of sale upon any judgment or decree shall be granted for a longer time than nine months from and after the rendi- of such judgment or decree.

SEC. 2. The order of sale on all decrees for the sale of mortgaged premises shall be stayed for the period of nine months from and after the rendition of such decree, whenever the defendant shall, within twenty days after the rendition of such decree, file with the clerk of the Court a written request for the same: Provided, That if the defendant make no such request within said

twenty days, the order of sale may issue immediately after the expiration thereof.

SEC. 3. On all judgments for the recovery of money only, except those rendered in any court on an appeal or writ of error thereto or against any officer or person or corporation, or the sureties of any of them, for money received in fiduciary capacity, or for the breach of any official duty, there may be a stay of execution if the defendant therein shall, within twenty days from the rendition of judgment, procure two or more sufficient freehold sureties to enter into a bond, acknowledging themselves security for the defendant for the payment of the judgment, interest, and costs, from the time of rendering judgment until paid, as follows:

First. If the sum for which judgment was rendered, exclusive of costs, does not exceed fifty dollars, three months.

Second. If the sum for which judgment was rendered, exclusive of costs, exceeds fifty dollars, and does not exceed one hundred dollars, six months.

Third. If the sum for which judgment was rendered, exclusive of costs, exceeds one hundred dollars, nine months.

SEC. 4. Officers approving stay bonds shall require the affidavits of the signers of such bonds that they own real estate not exempt from execution, and aside from incumbrance, to the value of twice the amount of the judgment.

SEC. 5. No proceedings in error or appeal shall be allowed after such stay has been taken, nor shall a stay be taken on a judgment entered as herein contemplated, against one who is surety in the stay of execution.

SEC. 6. The sureties for the stay of execution may be taken and approved by the clerk, and the bond shall be recorded in a book kept for that purpose, and have the force and effect of a judgment confessed from the date thereof against the property of the sureties, and the clerk shall enter and index the same in the proper judgment docket, as in the case of other judgments.

SEC. 7. When the surety is entered after execution issued, the clerk shall immediately notify the sheriff of the stay, and he shall forthwith return the execution, with his doings thereon.

SEC. 8. All property levied on before stay of execution, and all written undertakings for the delivery of

personal property to the sheriff, shall be relinquished by the officer upon stay of execution being entered.

SEC. 9. At the expiration of the stay the clerk shall issue a joint execution against the property of all the judgment debtors and sureties, describing them as debtors or sureties therein.

SEC. 10. When a stay of execution has been taken, such confessed judgment shall not release any judgment lien by virtue of the original judgment for the amount then due. The officer holding the execution shall return thereon what amount was made from the principal debtor and how much from the sureties.

SEC. 11. Secs. 478, 479, 480 and 481 of title 14 of chapter 57 of the Revised Statutes [of 1866] are hereby repealed.

SEC. 12. This act shall be in force and take effect from and after its passage.

Approved February 23, 1875.

This act is reprinted in Compiled Stats. of Neb., 1887, Part II., Secs. 477*b* to 477*j*.

The following are the sections in the Nebraska Revised Statutes of 1866 which are repealed by the above Act of February 23, 1875.

SEC. 478. On all judgments and decrees hereafter rendered in any of the District Courts in this territory, there shall be stay of execution or order of sale, as the case may be, as hereinafter provided.

SEC. 479. The order of sale on all decrees for the sale of mortgaged premises shall be stayed for the period of one year from and after the rendition of such decree, whenever the defendant shall desire such stay, and shall, within twenty days after the rendition of such decree, file with the Clerk of such Court a written request for the same; provided, that if the defendant make no such request within said twenty days, the order of sale may issue immediately after the expiration thereof.

SEC. 480. Execution on all judgments rendered in said Courts, shall be stayed for the period of one year from and after the rendition thereof; provided, the defendant shall within twenty days after the judgment is obtained, show to the satisfaction of the Clerk of such Court that he or she is the owner of real estate in the county of sufficient value, over and above encumbrances, to pay such judgment.

SEC. 481. On other judgments or decrees of said Courts, execution or orders of sale, as the case may be, shall be stayed for the period of one year whenever the defendant, within twenty days after the rendition thereof, shall enter into a bond to the plaintiff, with one or more sufficient sureties, residents of the county, to be approved by the Clerk of such Court, conditioned for the payment of the amount of such judgment or decree, together with the interest and costs, and costs that may accrue.

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SEC. 481. On other judgments or decrees of said Courts, execution or orders of sale, as the case may be, shall be stayed for the period of one year whenever the defendant, within twenty days after the rendition thereof, shall enter into a bond to the plaintiff, with one or more sufficient sureties, residents of the county, to be approved by the Clerk of such Court, conditioned for the payment of the amount of such judgment or decree, together with the interest and costs, and costs that may accrue.

125-876

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1887.

No. 76.

MILTON F. LAMASTER,

Plaintiff in Error,

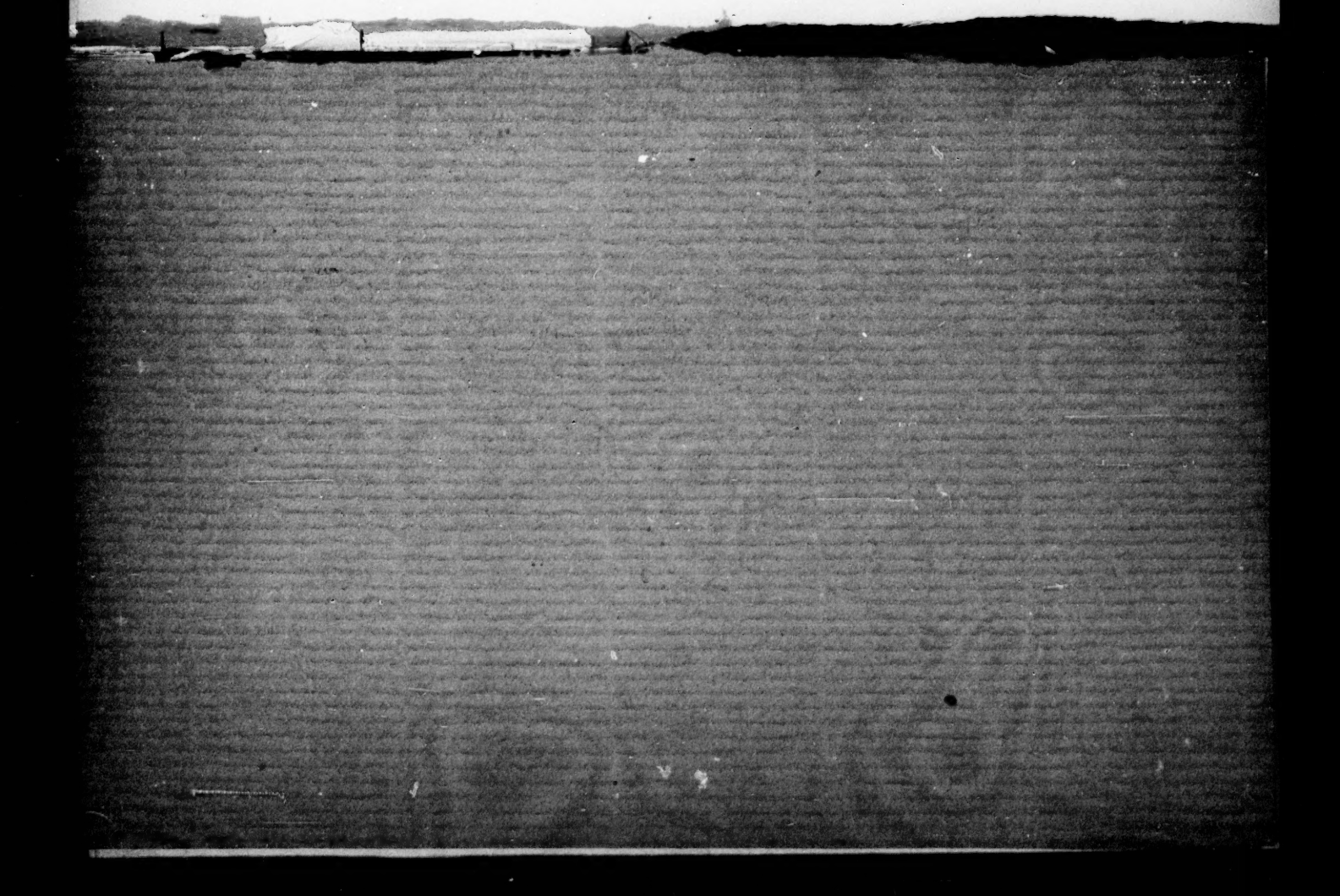
against

JOHN W. KEELER,

Defendant in Error.

BRIEF OF GEO. W. DOANE FOR THE PLAINTIFF IN ERROR.

BURGOYNE QUICK PRINTING CO., COR. WALKER AND CENTRE STS.



Supreme Court of the United States.

MILTON F. LAMASTER, Plaintiff in Error, AGAINST JOHN W. KEELER, Defendant in Error.	October Term, 1887. No. 76.

BRIEF OF **Geo. W. Doane** ON BEHALF OF PLAINTIFF IN ERROR.

Statement of Case.

On November 12, 1875, a judgment was obtained in the Circuit Court of the United States, for the District of Nebraska, in favor of Charles W. Seymour *et al.*, and against Wm. P. Young, for $6,500 and costs, and on the 2d day of December, 1875, a bond for a stay of execution upon said judgment was approved by the Clerk. Upon this bond appears the name of the plaintiff in error among several others.

The testimony shows that the stay bond was signed by plaintiff in error on the request of John Irwin—a co-obligor on said bond, and one whom the testimony shows was acting for the judgment debtor, Young. The bond was signed by Lamaster on

the assurance and promise at the time that two other persons, who were named, who lived in Nebraska City, and who were known to Lamaster to be reponsible, would also sign the bond, and that their signatures should be procured to the bond before it was presented to the Clerk. After signing the bond Lamaster justified as to his property, the affidavit of justification being attached to the bond. Upon consultation with his brother, Lamaster concluded he had done a foolish thing to sign the bond, and about 9 o'clock in the evening of the same day he went with his brother to Irwin's house, and told Irwin he had come to take his name off the bond. Irwin produced it and furnishing a pair of scissors requested Lamaster not to destroy the bond, and Lamaster cut his name off, supposing it was where it appeared on the bond, but as it turned out, it was the name attached to the affidavit of justification. By the dim light of the candle, which was the only light provided, it was difficult for him to distinguish the name even.

Lamaster never heard anything more of the bond, or that his name was claimed to be on it, until his property, the subject of this action, was advertised for sale, in 1881.

The bond was, on December 2, 1875, approved by the Clerk of the Court, and testimony was offered at the trial on behalf of Lamaster to prove that the Clerk (who was dead at the time of the trial), had admitted that in approving the bond he had not considered the name of Lamaster, as he thought the bond was good without his name, and that he had noticed the fact that the name of Lamaster had been removed from the justification upon the bond; which offer, upon objection being

made to the introduction of the testimony, was rejected by the Court, and an exception taken.

The bond for stay having been filed and approved, the Clerk entered the judgment on the judgment index against Lamaster as surety on the bond, under date of November 12th, 1875 (*the date of Seymour & Wardell's judgment against Young*) in pursuance of the Stay Law of Nebraska, approved February 23d, 1875; the third section of which provided for a stay of execution for a period of nine months upon judgments, on condition that the defendant should

> "Within twenty days from rendition of judgment procure two or more sufficient freehold sureties to enter into a bond acknowledging themselves security for the defendant for the payment of the judgment, interest and cost from the time of rendering judgment until paid."

The other sections of the law and the only ones which bear materially upon the questions in this case are the following:

Sec. 4. "Officers approving stay bonds shall require the affidavits of the signers of such bonds, that they own real estate not exempt from execution and aside from incumbrances to the value of twice the amount of the judgment."

Sec. 6. "The sureties for the stay of execution may be taken and approved by the clerk and the bond shall be recorded in a book kept for that purpose, and have the force and effect of a judgment confessed from the date thereof against the property of the sureties, and the clerk shall enter and index the same in the proper judgment docket as in the case of other judgments."

Sec. 9. "At the expiration of the stay the clerk shall issue a joint execution against the property of all the judgment debtors and sureties, describing them as debtors or sureties therein."

See Laws of Nebraska of 1875, page 49.

On the 30th day of December, 1876, and not before, an order of the Circuit Court of the United States for the district of Nebraska was entered adopting

"the laws of the State of Nebraska, then in force, regulating the issuing of executions and all the proceedings to be had thereon and thereunder, as rules of procedure to enforce the collection of judgments in the United States Circuit and District Courts for said State."

On the 14th day of April, 1881, an *alias* execution was issued upon said judgment, which was levied by the Marshal on lot 9 in block 56 in the City of Lincoln, as the property of the plaintiff in error as a surety on the stay bond, and having advertised and sold the lot under said execution to one Thomas Ewing, the sale was on the 1st day of September, 1881, confirmed by the Court, and a deed ordered to be made to the purchaser; which was accordingly done on the 9th day of May, 1882.

On the 23d day of May, 1882, Lamaster commenced an action in the District Court of Nebraska for Lancaster County (the County in which Lincoln is situated) against Thomas Ewing—the purchaser—to quiet the title of the lot in controversy, and to have the conveyance to Ewing therefor adjudged null and void, and also to enjoin Ewing, his agents or attorneys, from commencing or prosecuting any action to obtain possession of the premises or to recover the same, or to disturb the possession of Lamaster, and that during the pendency of the action, Ewing should be enjoined from conveying, incumbering or in any manner meddling with the premises, and that on the trial such injunction should be made perpetual. Upon this peti-

tion a temporary injunction was allowed by the Judge of the district in which the action was brought, on the same day of filing the petition.

On the 19th day of June, 1882, Ewing filed his answer in said cause, setting up his title, and all matters in defense of the action, and on the 8th day of July following a reply was filed by Lamaster.

On the same day upon motion of Ewing's attorney, the injunction was modified so far as it restrained the defendant from bringing and prosecuting any action in ejectment for recovery of possession of the premises, and from conveying and encumbering the same, and such portion of the injunction order was vacated.

On the 17th day of July, 1882, a deed of the lot was made by Ewing, who resided in Lincoln, Nebraska, to Keeler--his brother-in-law, who resided in Iowa, upon a consideration of $5,000 as expressed in the deed and sworn to by Keeler, which was $600 less than the amount paid by Ewing for the lot at the Marshal's sale in May, 1881, while the property had advanced in value between May 1881 and July 1882, and was worth at the date of transfer from Ewing to his brother-in-law, from $6,500 to $7,500.

On the same day of the transfer of the title from Ewing to Keeler, and while the aforesaid suit was pending in the State Court, this action was brought in the Circuit Court of the United States for the district of Nebraska in the name of Keeler, and against Lamaster to recover possession of the lot in controversy.

On the 24th day of November, 1882, a plea and answer was filed on behalf of Lamaster, and on the 1st day of February, 1883, the first trial was had to a jury resulting in a verdict for the defendant, which was

set aside, on motion of the plaintiff, under the Statute relating to actions of ejectment in force in Nebraska, which gives a right to two trials.

On the 1st day of March, 1883, an amended answer was filed by leave of the Court, to which a reply was filed on the 4th day of December, 1883.

On the 13th day of December, 1883, the second trial was concluded to a jury resulting in a verdict that

> "the conveyance of the lot in controversy from Ewing to Keeler was merely colorable and collusive and was made for the purpose of creating a case cognizable in the Federal Court, and the plaintiff was not the real party in interest, but that the action was being prosecuted for the use and benefit of Ewing, and that Keeler is only a nominal and colorable party."

This verdict was on the 3d of January, 1884, set aside on motion of Keeler's attorneys, and a third trial entered upon on the 28th day of January, 1884, resulting in a general verdict for the plaintiff under the peremptory instruction of the Court, with two special findings which had been submitted to them by the Court—the first as to the law of the case affecting the jurisdiction of the Court, and the second as to one question of fact, or rather one branch of a question of of a fact in the case.

Upon this verdict judgment was rendered by the Court in favor of the plaintiff Keeler on the 20th day of February, 1884, upon which error is assigned, as follows:

Errors Assigned.

I.

That the said Circuit Court erred in setting aside the findings and special verdict of the jury returned into said Court on the 13th day of December, A. D. 1883.

II.

That the said Circuit Court erred in not dismissing this case out of said Court upon the return of said special finding and verdict.

III.

That the said Circuit erred in admitting every item of testimony on the trial offered by the defendant in error against the objection of the plaintiff in error, to which, as shown by the bill of exceptions, the plaintiff in error then and there excepted.

IV.

That the said Court erred in excluding testimony on the trial offered by plaintiff in error under the objection of the defendant in error, to which plaintiff in error then and there duly excepted, and particularly the rejection of the testimony that the clerk did not consider Lamaster's name in approving the bond.

V.

That the said Court erred in refusing to reduce his instructions and charge to the jury to writing before giving the same to the jury, upon the written request

of the plaintff in error therefor; to which refusal attorney for plaintiff in error then and there duly excepted.

VI.

That the said Court erred in refusing to give to the jury the instructions requested on behalf of the plaintiff in error, numbered respectively one, two, three, four, five, seven and eight, and each of said instructions; to which refusals, and each of them separately, the plaintiff in error, by his attorney, then and there duly excepted.

VII.

That the said Court erred in giving to the jury the instructions requested by defendant in error, numbered respectively one, two, three and four, and each of them, to giving each of said instructions separately, the said plaintiff in error, by his attorney then and there duly excepted.

VIII.

That the said Court erred in instructing the jury to find for the defendant in error; to which instruction the said plaintiff in error, by his attorney, then and there duly excepted.

IX.

That the said Court erred in instructing the jury to return special findings on the propositions submitted to them by the Court.

X.

That the said Court erred in overruling the motion for a new trial made and filed by the plaintiff in error upon the grounds stated in said motion, to which ruling the said plaintiff in error, by his attorney, then and there duly excepted.

XI.

That the said Court erred in rendering judgment for the said defendant in error when judgment ought to have been given for the plaintiff in error, to which judgment the said plaintiff in error, by his attorney, then and there duly excepted.

THE INSTRUCTIONS refused and given and the Court's direction to find for the plaintiff are printed in the Appendix to this Brief.

ARGUMENT.

I.

That the Court erred in setting aside the findings and special verdict of the jury returned into said Court on the 13th day of December, 1883, and with this can be considered the

II.

That the Court erred in not dismissing this case out of said Court upon the return of said special findings and verdict.

The finding was upon an issue of fact directly presented upon the pleadings and tried to the jury, and the Court directed the jury to find specially upon these

issues. Having so found, I submit that the duty of the Court was to have dismissed the case out of Court.

On the second trial, the jury acting under their oaths and realizing that responsibility for their findings on question of fact submitted to them rested with themselves and not with the Judge, found accordingly; and it is submitted that when the Judge assumed to set aside the verdict and findings of the jury, instead of dismissing the case, he disregarded the rights of the defendant as laid down by this Court in

Williams vs. Nottawa, 104 U. S., 209.
Hayden vs. Manning, 106 U. S., 586.
Bernards Tp. vs. Stebbins, 109 U. S., 341.
Farmington vs. Pillsbury, 114 U. S., 138.

III.

That the Court erred in admitting the testimony below mentioned on the trial, offered by the defendant in error against the objection of plaintiff in error and to which the plaintiff in error excepted.

Each item of testimony introduced on behalf of the plaintiff below was objected to by the attorney for the defendant below, and upon being admitted an exception was noted.

THE MAIN CONTENTION was raised, however, upon the *admissibility of the entry in the judgment index* of the judgment which had been rendered in favor of Seymour and Wardell against William P. Young, and extending it as a judgment against Lamaster as a surety.

The journals of the Court are the records provided by law in which to enter the judgments and decrees of the Court. The only entry of a judgment introduced in evidence was that found in Journal "C" at page 388, and that was one in favor of Charles W. Seymour and William W. Wardwell, as plaintiff, against William P. Young, defendant. To this objection was made as immaterial and incompetent, which, of course, it was upon its face, but as preliminary to the proofs which followed, it was admitted.

Then followed the stay bond with Lamaster's name appearing upon it, and the entry on the judgment index extending the judgment against the name of Lamaster as surety. This it was claimed, and the Court held, had the force and effect of a judgment confessed from the date of the bond against the property of the sureties, and authorized the issue of a joint execution against the property of the judgment debtor and the sureties on the stay bond under the operation of the State law of February 23, 1875, cited above in the statement of the case.

With this view we take issue. The only judgment ever rendered by the Court upon which execution issued, under which the lot in controversy was sold, was that of Seymour and Wardwell against Young in November, 1875. To this judgment Lamaster was not a party, and no adjudication was ever had against him by the Court. The only semblance of a judgment against him was that created by the *ministerial* act of the Clerk in extending the title of the judgment, upon the judgment index against the name of Lamaster, as of the date when the judgment against Young was entered. If the Clerk could thus, by a mere scratch of

his pen, conclude a person who had never been served with process and who had no notice whatever of his proposed action, of what avail would be the boasted maxim of the law that no one could be concluded in his rights without having his day in Court? The only provisions of law under which it can be claimed there was any authority for the Clerk to enter the name of a surety on a stay bond upon the judgment index and issue an execution against his property thereon, are those contained in the State Law of February 23, 1875, cited above, in connection with the laws of Congress adopting and conferring upon the Federal Courts the authority to adopt the State execution laws in force in like case, and the rule of the Circuit Court of the U. S. adopting such laws.

Reference to these provisions and the dates when they took effect will show that the action of the Clerk in that behalf in this case was entirely without authority, and that all the proceedings based upon it were void.

On February 23, 1875, the Legislature of Nebraska passed a law entitled, "*An Act to provide for the stay of execution and orders of sale*," which, after providing for the stay to be allowed on decrees for the sale of mortgaged premises, enacted, in section 3, as follows:

"On all judgments for the recovery of money only," &c., &c., &c., "there may be a stay of execution if the defendant therein shall, within twenty days from the rendition of judgment, procure two or more sufficient freehold sureties to enter into a bond acknowledging themselves security for the defendant for the payment of the judgment, interest and costs from the time of rendering judgment until paid, as follows: 'If the sum for which judgment was rendered, exclusive of costs, exceeds one hundred dollars, nine months.'"

The other sections are quoted in the Statement.

IT WAS CLAIMED UPON THE TRIAL, and the Circuit Court so held, that these provisions of the State law were in force in the Circuit Court of the United States for the District of Nebraska, on December 2, 1875, and were applicable to the judgment rendered therein in favor of Seymour and Wardwell against Young.

This was claimed by virtue of Secs. 914 and 916, Rev. St's of U. S., enacted in 1872.

SEC. 914 provides that "the practice, pleadings and forms and modes of proceeding in civil causes other than equity and admiralty causes in the Circuit and District Courts, shall conform as near as may be to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the Courts of Record of the State within which such Circuit or District Courts are held, any rule of Court to the contrary notwithstanding."

That this section does not apply to remedies *after* judgment for collecting the same, but to the pleadings, practice and proceedings in the progress of a cause before judgment, is evident, not only from the terms used in the section itself, but from the succeeding sections in the same act. The terms "practice" and "pleadings" in a cause refer to the steps taken in the progress of cause leading up to judgment, and may or may not be regulated by statute. That Section 914 refers to such steps, and not to special remedies provided by statute, nor to the remedies provided for collecting judgments by execution or otherwise, is sufficiently indicated by Sections 915 and 916, which are parts of the same act, and which specifically provide for such remedies.

SEC. 916 *provides* that a party recovering a judgment

in any common law cause in any Circuit or District Court, shall be entitled to similar remedies upon the same by execution, or otherwise, to reach the property of the judgment debtor as are now (at the time of the Act of June 1st, 1872) provided in like causes by the laws of the State in which such Court is held, or by any such laws hereafter enacted, which may be adopted by general rules of such Circuit or District Court, and such Courts may from time to time by general rules adopt such State laws as may hereafter be in force in such State in relation to remedies upon judgments as aforesaid by execution or otherwise.

If there was any authority under which the provisions of the State law enacted by the Legislature of Nebraska "to provide for stay of executions and orders of sale" could be applied to judgments rendered in the U. S. Courts, it must be found in this section, supplemented by such rules as may have been made by the Circuit Court adopting the remedies provided by the State law. We contend there was no such authority.

The State law not having been passed until Febuary 23, 1875, was not by virtue of such enactment engrafted upon the remedies afforded under judgments rendered in the U. S. Courts, for Sec. 916 in express terms limits the remedies thereby given, to those then, at the time of the passage of the Act of June 1, 1872, provided in like causes by the laws of the State. The provisions of any State laws subsequently passed could only be made applicable to the remedies upon judgments in the U. S. Courts, by general rules of such Courts adopting the same.

Without such rules the State law would have no force or effect whatever in the U. S. Courts.

Wayman vs. Southard, 10 Wheaton, 1.
Bank of U. S. vs. Halstead, 10 Wheaton, 51.

Ross vs. Duval, 13 Pet., 45.
Beers vs. Haughton, 9 Pet., 329.
Amis vs. Smith, 16 Pet., 303.

THE ONLY RULE ever made by the Circuit Court of the U. S. in Nebraska which can be claimed to have adopted this State law was that of Dec. 30th, 1876, found on page 53 of the printed record.

WE INSIST THAT SUCH RULE COULD NOT BE APPLIED to this case for the reasons,

1st. That by the terms of the order itself, it adopted only the laws of Nebraska then in force "regulating the issuing of executions and all the proceedings to be had thereon and thereunder," "to enforce the collection of judgments in the U. S. Circuit and District Courts." It did not adopt the State law providing for "stay of executions and orders of sale," nor the provision of such law as to remedies against sureties on stay bonds. The term "laws in force regulating the issuing of executions," implies a judgment already rendered upon which an execution could issue, and the final clause of the order limits the operation of the rule to cases "to enforce the collection of judgments in the U. S. Circuit and District Courts" so that there must be a judgment to the issuing of execution upon which the rule must apply. But there was no *judgment* against the sureties on this stay bond, upon which an execution could issue.

The rule could have no other or broader construction than to apply the remedies given by the State law against judgment debtors for the collection of judgments against them. The State law made no provision for entering a judgment against the sureties on a stay bond, but provided that the bond should be recorded

and "have the force and effect of a judgment confessed," &c. A rule adopting provisions "regulating the issuing of executions upon judgments rendered and all the proceedings to be had thereon and thereunder" is one thing; but it is a very different thing to adopt a rule fixing a liability upon a surety on a bond and providing remedies against him which did not exist when the bond was given.

For that reason we insist that this rule cannot be applied as a rule of procedure to this case, because,

2d. Even if the rule was intended to cover this class of cases, it was not in the power of the Court to adopt a rule which should be retroactive in its effect upon the rights of parties.

The stay bond signed by Lamaster was a contract by the terms of which he acknowledged himself security for the defendant for the payment of the judgment, &c., in nine months from the rendering of the same. This was filed November 25th, 1875, approved by the Clerk December 2, 1875 (see copy of the bond on pages 53, 54 of the printed record). It will be observed that at the time this bond was signed there was no law of Congress, or rule of Court, adopting the State law of February 23d, 1875, authorizing such stay bond to be given.

Waiving the question as to the validity of such a bond in the absence of a law providing for it, no greater effect could be given it than to a common law bond, and it would not be in the power of either the Legislature or the Courts, by any law or rule of Court *subsequently* adopted, to enlarge the obligation created

by the bond, or to change the legal status of the obligors.

Under this bond, as the law stood when it was executed and approved, the parties to it were entitled to their day in Court to contest and have an adjudication upon the nature and extent of their liability, or upon the question whether any liability existed—to do, in fact, just what Lamaster strove to do upon the trial of this case but which, under the ruling of the Court, he was prevented to do, *namely, show that this was not his bond.* Lamaster has never had his day in Court under the judgment for the satisfaction of which his property has been taken and sold.

BUT IT WAS URGED ON THE TRIAL THAT HE APPEARED AND CONTESTED THE CONFIRMATION OF THE SALE, and urged the same objections to the validity of the bond and the jurisdiction of the Court to issue execution against him, &c., which he here urges, and that the sale having been confirmed notwithstanding the objections, he is now concluded on those questions, and is estopped to litigate the same questions in this case.

In order to lay the foundation for such claim, the plaintiff below introduced in evidence, against the objections of defendant, the motion made by Lamaster to set aside the sale (a copy of which marked "B" appears in the printed record at page 36), and also the bill of exceptions preserved, upon the ruling of the Court on said motion (a copy of which bill of exceptions marked "E" appears in the printed record from page 38 to 49). To the admission of these items

of proof by the Court, the defendant below, Lamaster, excepted.

This evidence was inadmissible, for the reason, if for no other, that the Court in confirming the sale would not necessarily pass upon any of the questions presented by the motion to set aside the sale. On a motion to confirm a sale made under execution, the Court examines, as it did in this case on the motion, not into extrinsic facts, but *only into the proceedings of the officer*, and upon being satisfied that the sale has been made in conformity to the provisions of law regulating sales under execution, the Court is required to direct the Clerk to make an entry on the journal accordingly, which is the order of confirmation (Sec. 498, Code of Civil Procedure of Neb., Title "Executions"). This being so, the order of confirmation is conclusive of nothing except the regularity on their face of the proceedings of the officer making the sale.

But if there was no valid judgment upon which to base the execution, the sale thereunder was a nullity, and the Court had no jurisdiction to make any order which should be binding on Lamaster.

Downs vs. Fuller, 2 Met. (Mass.), 135.
Caldwell vs. Webster, 18 Pa. St., 79.
Higgins vs. Peltger, 49 Mo., 152.
Higgins vs. Geoghegan, 1 Met. (Ky.), 169.
Wilson vs. Arnold, 5 Mich., 98.
Gregory vs. Taber, 19 Cal., 397.
Townsend vs. Talbot, 34 Cal., 45.
Shriver's Lessee vs. Lynn, 2 How., 43.
Gautley's Lessee vs. Ewing, 3 How., 707.
Shelton vs. Tiffin, 6 How., 163.
Minn. Co. vs. St. Paul Co., 2 Wall., 609.

In some of these cases, notably the California cases and the cases in 2 How., 43, and in 2 Wallace, 609, the sales were held void for want of jurisdiction notwithstanding confirmation.

THE ONLY REMAINING ITEM OF EVIDENCE to which I desire to call attention under this assignment is the *admission of the record copy of the deeds* from the Marshal to Ewing and from Ewing to Keeler of the lot in controversy. The law of Nebraska, Sec. 13, chapter 73, Comp. Sts., provides "that the record of a deed duly recorded or a transcript thereof duly certified may be read in evidence with the like force and effect as the original deed whenever, by the party's oath or otherwise, the original is shown to be lost or not belonging to the party wishing to use the same nor within his control."

The only showing made as a foundation for the introduction of copies of these deeds is contained on pages 21 to 24 inclusive of the printed record, and we insist that was not sufficient and that the copies were improperly admitted.

IV.

That the Court erred in excluding testimony on the trial below mentioned, offered by the plaintiff in error under the objection of defendant in error, to which plaintiff in error duly excepted.

Plaintiff in error offered to show by Joseph E. Lamaster, his brother, that he had a conversation with the Clerk of the Court, now deceased, in regard to the approval of the stay bond which had been presented to stay the judgment of Seymour *et al.* vs. Young, in which the Clerk stated that he did not consider the name of Lamaster in approving the bond, that he considered the bond good without his name, and he noticed the fact that the justification of defendant had been removed from the bond (see printed record, page 27).

This testimony was excluded under objection of defendant in error. As the Clerk was the one upon whom the responsibility was placed under the law of approving the bond and of acting upon such approval, and the question was presented by the pleadings as to whether this was the bond of Lamaster and to what extent his own laches would estop him to deny that it was his bond, we think the testimony, the best which existed, should have been received as a statement by the Clerk in the course of his official duty, that he did not act or rely upon it as the bond of Lamaster. If he did not rely upon it the very foundation of an estoppel fails. So, it is evidence that he *knew* that the bond was defective and imperfect as to Lamaster when he approved it.

V.

That the Court erred in refusing to reduce his instructions and charge to the jury to writing before giving the same to the jury, upon the written request of the plaintiff in error therefor, to which refusal attorney for plaintiff in error excepted.

THE CODE OF PROCEDURE regulating the practice in the State Courts of Nebraska provides as follows (Sec. 52):

"It shall be the duty of the Judges of the several District Courts in all cases, both civil and criminal, to reduce their charge or instructions to the jury to writing before giving the same to the jury, unless the so giving of the same is waived by the Counsel in open Court, and so entered in the record of said case."

Sec. 54. "The Court must read over all the instructions which it intends to give and none others to the jury, and must announce them as given, and shall announce as refused without reading to the jury, all those which are refused," &c.

Sec. 56. "No oral explanation of any instruction authorized by the preceding sections shall in any case be allowed, and any instruction or charge, or any portion of a charge or instructions given to the jury by the Court, and not reduced to writing as aforesaid, or a neglect or refusal on the part of the Court to perform any duty enjoined by the preceding sections, shall be error in the trial of the case and sufficient cause for the reversal of the judgment entered therein." (Comp. St's of Neb., pages 203 and 204.)

This law was passed for the protection of suitors. It prevents errors and mistakes and secures the defeated party the full benefit of a review in an appellate court.

In this cause counsel for the defendant thought it to

be proper and prudential to make this request under the law, and notwithstanding the trial Judges in the Federal Courts have been in the habit of disregarding these provisions of the law for the regulation of the practice in the State Courts, and have generally held that they do not apply to and are not binding upon the Federal Courts ; still, a due regard for the expressed wish of a suitor, couched in respectful language, would seem to have called for a recognition, at least, if not a compliance, but no attention whatever was given by the Court to the request, except to refuse the same.

We are therefore limited to the exception taken to the refusal of the Court to reduce his charge to writing before giving the same to the jury, which exception is found on page 29 of the printed record. If there is any instance in which the law regulating the practice in the State Court ought to be enforced in the Federal Court it is this Nebraska law requiring the charge of the Court, at least when specially requested, to be reduced to writing before it is given to the jury.

It is difficult to find any reason for the application of other provisions of the State law regulating the practice, to the Federal Court, which does not also apply to this law. If this question is an open one in this Court we respectfully submit the above views to the Court's judgment.

VI.

"That the Court erred in refusing to give to the jury the instructions requested on behalf of Plaintiff in error, numbered respectively, 1, 2, 3, 4, 5, 7 and 8, and each and every of said instructions, to which refusals and each of them separately the said Plaintiff in error excepted."

The instructions requested and refused are found on page 30 of the printed record, and are reprinted in the Appendix hereto.

The 1st, 2d and 3d instructions so requested relate to the effect of the action of the Clerk in extending the judgment of Seymour *et al.* against Young, upon the judgment index against Lamaster, and issuing execution thereon against him, and has been already considered in the argument upon the admission of testimony.

The fourth instruction requested and refused, refers to the legal effect of what was done by Lamaster towards removing his name from the stay bond, and withdrawing as one of the sureties thereon. It went no further than to ask the Court to leave it to the jury to find whether the bond had ever been delivered as the bond of Lamaster. This was clearly a question of fact for the jury to pass upon under the testimony, and in refusing to submit the question to the jury, the Court assumed as a matter of law, that the bond had been duly executed and delivered, and that none of the facts proven would avail as a defense to Lamaster. In this Court was, we submit, clearly in error.

In the conflict of authority as to the effect of the delivery of a bond to a co-obligor or a stranger as an escrow upon conditions, which have not been complied with, and accepting the decision of this Court in Dair vs. United States (16 Wallace, 1), as the law on that question in cases of the like character, the *distinction is taken* in every case without an exception, where such a delivery has been held good, between the *delivery of a bond perfect and complete on its face and under the law, and one that is imperfect or incomplete*, and, therefore, such as to put the obligee or his agent on inquiry. If upon the face of the bond anything was lacking which would challenge the notice of the obligee or his agent or in this case the Clerk of the Court, the doctrine of estoppel upon which the case in 16 Wallace and kindred cases rest would not apply.

There was testimony in this case showing that the affidavit as to the sufficiency of Lamaster as a surety, which the law provided should be required by the Clerk to be made as a condition of approval, had been cut from the bond, or at least the signature of Lamaster had been visibly cut therefrom (see testimony of M. F. Lamaster on page 25 of printed record and that of J. E. Lamaster on page 26).

This was a fact to go to the jury in connection with other facts proven, on the question as to whether or not there had been a delivery of the bond binding on Lamaster.

Dair vs. United States, 16 Wall., 1.

The State *ex rel.* McCarty vs. Pepper *et al.*, 31 Ind., 82.

The Wild Cat Branch vs. Ball *et al.*, 45 Ind., 218.

State vs. Peck, 53 Maine, 284.
Fletcher vs. Austin, 11 Verm., 447.
Pawling vs. The U. S., 4 Cranch, 218.
People vs. Bostwick *et al.*, 32 N. Y., 445.

The state of the law as we claim it, under which the 7th request was made, has been already discussed in the argument upon the refusal of the 1st, 2d and 3d requests, and need not therefore be further noticed.

VII.

"That the Court erred in giving to the jury the instructions requested by the defendant in error, numbered respectively 1, 2, 3 and 4, and each and every of them, to the giving of each of which instructions separately the said plaintiff in error excepted."

These instructions will be found on pages 31 and 32 of the printed record, and in the Appendix hereto.

The 1st, 2d and 3d of these instructions raise the same questions as to the validity of the stay bond against Lamaster, and the binding effect of the State law upon the Circuit Court of the United States, as those presented by the requests on behalf of the defendant below, and refused.

The first of these instructions, however, took from the jury the question of fact, which was to be deduced from all of the testimony as to the intention of Lamaster in cutting his name from the bond, and whether or not there had been any valid delivery of the bond

as to him, and all other questions of fact connected therewith. The Court solved these questions against the plaintiff in error, and did so upon the utterly erroneous assumption as to the proven facts—namely, that "the bond was perfect on its face." This was at least a contested fact in the case, and the Jury having the bond itself in evidence before them, had the right to pass on that question. But the Court usurped that right, and left nothing for the jury.

The third instruction goes the full length of saying that the laws passed by the State Legislature regulating not only the practice and modes of procedure in civil causes, but the remedies after judgment to enforce the collection of the same, became operative *ex proprio vigore*, in the Circuit Court of the United States for the District, independent of any rule of the Court adopting the same. This is in direct conflict with the decisions of this Court in

Wayman vs. Southard, 10 Wheaton, 1.
Bank of U. S. vs. Halstead, 10 *Ib.*, 51.
Amis vs. Smith, 16 Pet., 303.

VIII.

That the Court erred in instructing the Jury to find for the defendant in error, to which instruction the said plaintiff in error by his attorney excepted.

By this instruction all the contested questions of fact as to the condition of the bond when presented to

the Clerk—the delivery of the same by Lamasters, the collusion between Ewing and Lamasters by which a case should be made for cognizance in the Federal Court, the interest of Keeler in the lot in controversy, whether he was the real party in interest in this suit, &c., &c., were taken from the jury and solved by the Court in favor of the defendant in error. This was a clear usurpation of the province of the jury.

IX.

That the Court erred in instructing the jury to return special findings upon the propositions submitted to them by the Court.

These propositions will be found on page 31 of the printed record. The submission to the jury of the question of the jurisdiction of the Court, as was done by the first of the special findings, is among the curiosities of the law, since the *Court* found as to all the questions of *fact*, and submitted to the *jury* the questions of *law*. Is it surprising under these circumstances that the jury should have remained for 48 hours from January 30th to February 1st (as the record shows), deliberating over their verdict when the court had peremptorily ordered them to return a verdict for the plaintiff? The Court declined again to submit to the jury for special findings the questions of fact which had been submitted on the previous trial, and upon which the jury had the undoubted right to pass.

The jury on the third trial was not trusted upon any material question of fact, but upon the legal question of the jurisdiction of the Court, the opinion of the jury was indispensable.

Other questions are discussed in the Argument of associate counsel to which I refer.

GEO. W. DOANE,
attorney for Plaintiff in Error.

APPENDIX,

being reprint from the Record (pp. 30-32) of the INSTRUCTIONS refused and given, and of the COURT'S CHARGE or direction to the jury.

"AND THEREUPON the said *defendant*, by his attorney, requested the Court, in writing, to instruct the jury as follows (Printed Record, p. 30):

"I. The alleged judgment entered or extended by the clerk upon the docket against the defendant was null and void, and did not authorize the issue of an execution against the property of the defendant."

Which instruction the Court refused to give; to which refusal the said defendant, by his attorney, then and there duly excepted.

"II. The execution upon which the property in question was sold by the Marshal was invalid as to the defendant, and did not authorize the levy upon and sale of the said property."

Which instruction the said Court refused to give; to which refusal the said defendant, by his attorney, then and there duly excepted.

"III. Upon the evidence in the action the plaintiff is not entitled to recover."

Which instruction the said Court refused to give; to which refusal the said defendant, by his attorney, then and there duly excepted.

"IV. If the jury find that the defendant did not authorize the delivery of the stay bond in question, with his name thereto subscribed or affixed, and that, when the same was presented to the Clerk of this Court for acceptance and approval, the same was not perfect and complete, but, on the contrary, that the defendant's name originally subscribed to his affidavit respecting his property, or his sufficiency as a surety, had been visibly cut therefrom, and that the appearance of the bond so changed or mutilated was sufficient to put the

clerk upon inquiry, and to notify him that the defendant had withdrawn from the bond, they are at
47 liberty to find that the said bond had not been delivered as the bond of the defendant."

Which instruction the Court refused to give; to which refusal the said defendant, by his attorney, then and there duly excepted.

"V. The jury are to determine from all the evidence whether the alleged bond of the defendant was or not delivered by him as his bond; and, if they find that it was not, they should find for the defendant."

This instruction not given.

"VI. If the jury find that the plaintiff is not the real party in interest, but that he received the conveyance of the property, if at all, for the benefit of Ewing, and has no beneficial interest therein, and that this suit is being prosecuted solely for the benefit of Ewing, they should find the fact to be so.

"VII. The act of the Legislature of Nebraska respecting the stay of executions and orders of sale, approved February 23d, 1875, was not operative to authorize the execution against Lamaster's property."

Which instructions the said Court refused to give; to which refusal the said defendant, by his attorney, then and there duly excepted.

"VIII. The record introduced in evidence tends to show that at the time of the commencement of this action there was pending in the district court for Lancaster County, in this State, an action between the defendant herein as plaintiff, and Thomas Ewing, the grantor of Keeler, the present plaintiff, involving and requiring the determination of the same issue of title as herein involved; and if you find that this was so, and that the plaintiff obtained the conveyance in question from Ewing pending the same action in the State Court, and that the same is still pending, this is sufficient to abate the present action, and you should so find."

Which instruction the Court refused to give;
48 to which refusal the said defendant, by his attorney, then and there duly excepted.

BUT THE SAID COURT, on the contrary, *instructed the jury to find a general verdict for the plaintiff.* To which instruction the said defendant, by his attorney, then and there duly excepted.

AND THE SAID COURT also instructed the jury to *return special findings* upon the following propositions, to wit:

I. Did (or did not) this action arise under the laws of the United States?

II. Did (or did not) plaintiff, J. W. Keeler, and Thomas Ewing, enter into an agreement or understanding whereby said plaintiff agreed to reconvey to said Ewing the said premises or hold the same for him?

AND THEREUPON the said *plaintiff*, by his attorney, requested the Court, in writing, to instruct the jury as follows, to wit (Record, p. 31):

I. The bond which has been introduced in evidence and recorded in a book kept by the clerk for the purpose, being perfect on its face and apparently executed by all whose names appear thereto, and among them by the defendant Lamaster, having no blanks for the insertion therein of the names of other parties or other defects or deficiencies, must be taken to be the bond of the parties signing the same, and among them of the defendant Lamaster, and binding him according to its terms.

If he directed Irwin not to deliver the bond as his bond and took his name from the affidavit of justification appended thereto, but through inattention left his name, signed by him, to the bond itself, these circumstances are not sufficient to avoid the instrument in the hands of the clerk and for the benefit of the parties who by means of it were deprived of rights and remedies upon their judgment. The jury will, therefore, disregard all the testimony given by the defendant

Lamaster and his brother of what passed between them and Erwin after the defendant had executed the bond and treat the instruments in all respects
49 as one entered into by defendant Lamaster's voluntarily, intelligently and binding upon him and his property, unless notice of the facts were communicated to the clerk or plaintiffs in the judgment.

Which instruction was given by the Court; to which the said defendant, by his attorney, then and there duly excepted.

II. The filing of the defendant's bond with the Clerk of this Court and its approval by him, and also his approval of the sureties thereto, including the defendant, the record of the same, the entry of memoranda thereof in the judgment index, called in the statute "extending the judgment," justified the issue by the Clerk of this Court of an execution upon the judgment of Seymour and Wardell against Young and others, directed to the marshal, commanding him to make the balance due upon the judgment out of the property of the principals and sureties, including that of the defendant Lamasters, and the sale by the Marshal of the defendant's property under and by virtue of the execution was authorized by law.

Which instruction was given by the Court; to which the said defendant, by his attorney, then and there duly excepted.

III. I charge you that when this bond was taken by the Clerk, as has been shown in evidence, and when the proceedings were taken thereon leading to the sale by the marshal of the property in question, the statute of this State passed on the 25th of February, 1875, and entitled "An Act to provide for stay of executions and order of sales," was in force in this Court and was a law therein, the same as in the District Courts of the State.

Which instruction was given by the Court; to which the said defendant, by his attorney, then and there duly excepted.

IV. The pendency of the alleged action between Lamasters and Ewing in the State Court does not abate this suit or prevent in anywise the plaintiff from prosecuting the same.

50 Which instruction was given by the Court; to which the said defendant, by his attorney, then and there duly excepted.

123-376

123-376

Supreme Court of the United States.

MILTON F. LAMASTER,
Plaintiff in Error,

vs.

JOHN W. KEELER.

BRIEF FOR DEFENDANT IN ERROR.

J. M. WOOLWORTH,
ATTORNEY FOR DEFENDANT IN ERROR.

F. A. Manger, Printer, 1402 Farnam St. Omaha.

Supreme Court of the United States.

MILTON F. LAMASTER,
Plaintiff in Error,

vs.

JOHN W. KEELER.

BRIEF FOR DEFENDANT IN ERROR.

This was an action of ejectment, brought by the defendant in error in the Circuit Court of the United States, for the District of Nebraska. The title was in the plaintiff in error, when, as the defendant in error contends, it became charged with the lien of a judgment, upon which the premises were sold, and the grantor of the defendant in error became the purchaser. The controversy mainly arises upon the validity of this judgment and sale. The facts are these:

The bill of exceptions, beginning at page 20 of the record, shows that on the 12th of November, 1875, of the United States Circuit Court for the District of Nebraska, Charles W. Seymour and

William W. Wardell recovered a judgment against William P. Young for $6,500 debt, and $815.97 costs. The plaintiff below introduced in evidence the record of a bond in the book of stay bond record (p. 20); and the defendant below introduced in evidence the original bond, which is set forth at length on page 53, as follows:

"Whereas Charles W. Seymour and W.W. Wardell did, at the November term, 1875, of the United States Circuit Court, holden at Omaha, within and for the District of Nebraska, recover a judgment in said court against William P. Young for the sum of six thousand five hundred dollars, damages, and for their cost in and about said suit; Now therefore, we, John Irwin, Jane Y. Irwin, William T. Donovan, Nathan F. Moffitt, and Milton F. Lamaster, freeholders in the State of Nebraska, do hereby acknowledge ourselves security for the defendant for the payment of the judgment, interest and costs, from the time of rendering said judgment until paid, to be paid nine months from the rendering of the same.

John Irwin,
Jane Y. Irwin,
W. T. Donovan,
Milton F. Lamaster,
Nathan R. Moffitt."

Attached thereto are affidavits of justification of all the parties signing the bond, except Lamaster.

The plaintiff also introduced in evidence (p. 24) the judgment index of the court, on the sixth line of which under the letter "L," was an entry, as follows:

"Defendants, Lamaster, M. F., et al, surety; Plaintiffs, Seymour and Wardell; appearance Docket C, No. 138; date of judgment, Nov. 12th 1875; amount of judgment, $6,500."

The plaintiff further introduced in evidence an execution, which, with the proceedings thereon, will be found at pages 33—36. The excution, running to the marshal, commands him, that of the goods and chattels, and for want thereof, then of the lands and tenements of William P. Young, debtor, and John I. Irwin, Jane Y. Irwin, W. T. Dovovan, Milton F. Lamaster, and Nathan F. Moffitt, sureties, he cause to be made $4,744.31, balance upon the judgment hereinbefore recited. Attached to the execution were the appraisment of Lamaster's interest in the premises in question, the marshal's notice of the sale of the premises under the execution, and his return showing the sale thereof

to Thomas Ewing for $5,600. The execution was tested on the 14th of April, 1881, and the sale was made on the 17th of May following.

The record shows further a motion of Lamaster to set aside this sale. This paper will be found on pages 36 and 37 of the record. He filed an affidavit in support of this motion (pp. 45 and 46) Plaintiff also moved for a confirmation of the sale. These motions came on to be heard before the court, when that of the plaintiff was sustained, and the sale duly confirmed, and that of Lamaster's was overruled. (p. 38.) The marshal's deed was made to the purchaser, Ewing, who conveyed to the defendant in error. (pp. 49, 51.)

Lamaster brought an action in the District Court of the state against Ewing, the pendency of which he pleads in bar to this action. He also claims that the conveyance from Ewing to Keeler was contrived for the purpose of raising a case within the jurisdiction of this court, Ewing and Lamaster being citizens of Nebraska, and Keeler being a citizen of Iowa.

The statute of the State, in pursuance of which the bond to stay the execution of the judgment was given, was an act entitled "An Act to provide for stay of executions and orders of sale," which

was approved February 23d, 1875. It will be found in the Compiled Statutes of Nebraska, page 590; and so far as its provisions are necessary to be set forth for our present purpose, they are as follows:

"Section 3. On all judgments for the recovery of money only, * * * there may be a stay of execution, if the defendant therein shall, within twenty days from the rendition of judgment, procure two or more sufficient freehold sureties to enter into a bond, acknowledging themselves security for the defendant for the payment of the judgment, interest and costs, from the time of rendering judgment until paid, as follows: * * * Third. If the sum for which judgment was rendered, exclusive of costs, exceeds one hundred dollars, nine months.

"Sec. 4. Officers approving stay bonds shall require the affidavits of the signers of such bonds, that they own real estate not exempt from execution, and aside from incumbrance, to the value of twice the amount of the judgment.

* * * * *

"Sec. 6. The sureties for the stay of execution may be taken and approved by the clerk, and the bond shall be recorded in a book kept for that purpose, and have the force and effect of a judgment

confessed from the date thereof, against the property of the sureties, and the clerk shall enter and index the same in the proper judgment docket, as in the case of other judgments.

"Sec. 7. When the surety is entered after execution issued, the clerk shall immediately notify the sheriff of the stay, and he shall forthwith return the execution, with his doings thereon.

"Sec. 8. All property levied on before stay of execution, and all written undertakens for the delivery of personal property to the sheriff, shall be relinquished by the officer upon stay of execution being entered.

"Sec. 9. At the expiration of the stay the clerk shall issue a joint execution against the property of all the judgment debtors and sureties, describing them as debtors or sureties therein."

FIRST POINT.

The provisions of the statute were all complied with, except in one particular, which will be noticed hearafter, that is to say: First, within twenty days from the rendition of the judgment, on the 25th of November, 1875, a stay bond was filed, and on the 2nd of December, 1875, approved

by the clerk, (p. 54 fol. 82); Second, this bond was signed by five sureties, four of whom showed by their respective affidavits that they were sufficient freeholders, whose real estate was not exempt from execution, and of the value of twice the amount of the judgment; Third, this bond was recorded in a book kept for that purpose, that is to say, Stay Bond Record A of the court, (p. 20); Fourth, the clerk entered and indexed the same in the proper judgment docket as in the case of other judgments (p. 20); Fifth, after the expiration of the nine months, that is to say on the 14th of April, 1881, the clerk issued a joint execution against the property of the judgment debtor, Young, and the parties obliged by the bond, describing them respectively therein as debtor and sureties, (p. 33).

The question presented at this point of the case is, whether these proceedings subjected the premises which were the property of Lamaster, to the lien of the judgment and to sale under an execution issued thereon. The question was raised on the trial and saved as follows:

The defendant requested the court to direct the jury that, "The act of the legislature of Nebraska respecting the stay of executions and orders of

sale, approved February 23d, 1875, was not operative to authorize the execution against Lamaster's property." (p. 30.) This was refused.

On the other hand the court charged the jury as follows: (p. 32.)

"The filing of defendant's bond with the clerk of this court, and its approval by him, and also his approval of the sureties thereto, including the defendant, the record of the same, the entry of memoranda thereof in the judgment index, called in the statute 'extending the judgment,' justified the issue by the clerk of this court of an execution upon the judgment of Seymour and Wardell against Young and others, directed to the marshal, commanding him to make the balance due upon the judgment out of the property of the principal and sureties, including that of the defendant Lamaster, and the sale by the marshal of the defendant's property under and by virtue of the execution was authorized by law."

And again, on the same page: "I charge you that when this bond was taken by the clerk, as has been shown in the evidence, and when the proceedings were taken thereon leading to the sale by the marshal of the property in question, the statute of this state, passed on the 25th of

February, 1875, and entitled "An act to provide for stay of executions and orders of sale,' was in force in this court, and was a law therein, the same as in the District Courts of the State."

Section 914 of the Revised Statutes of the United States, taken from the Act of June 1st, 1872, is as follows:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held, any rule to the contrary notwithstanding."

This section adopted as part of the jurisprudence of the Federal Court in Nebraska the statute of that State by virtue of which the proceedings here complained of were had.

I. The words in the section of the Revised Statutes above set forth, "modes of proceeding," were not new in the process acts of Congress at the time of the passage of the Act of 1872. They are found in all that class of Acts. For instance, section 2 of the Act of 1789, which was the first

of the series, provided "that until further provision shall be made * * the forms of writs and executions, except their style, and *modes of process* * * in the Circuit and District Courts, in suits at common law, shall be the same in each State respectively as are now used or allowed in the Supreme Courts of the same."

In 1792 an act was passed, the second section of which ran as follows: "The forms of writs, executions and other process, except their style, and the forms and *modes of proceeding* in suits, in those of common law, shall be the same as are now used in the said courts respectively, in pursuance of the act entitled 'An act to regulate processes in the courts of the United States.'"

In *Wayman vs. Southard,* 10 Whea. 1, these statutes came before this court for construction, upon a certificate of division of opinion between the judges of the Circuit Court for Kentucky. A motion had been filed in that court to quash the marshal's return to an execution, issued on a judgment recovered therein, and also a bond taken upon the execution. The report does not state the facts very distinctly, but it appears that the marshal pursued the direction of a then recent statute of Kentucky, which provided for an appraisment of

the property, and its sale at not less than three-fourths of its appraised value, and granting to the defendant time for the payment of the judgment.

Chief Justice Marshall delivered an elaborate opinion, in which, after dealing with some matters not involved in the present inquiry, he considered with great care, whether the words "and modes of process," covered the proceedings of the marshal upon an execution.

At page 27 he uses this language:

"To 'the forms of writs and executions,' the law adds the words 'and modes of process.' These words must have been intended to comprehend something more than 'the forms of writs and executions.' We have not a right to consider them as mere taulology. They have a meaning, and ought to be allowed an operation more extensive than the preceding words. The term is applicable to writs and executions, but it is also applicable to every step taken in a cause. It indicates the progressive course of the business, from its commencement to its termination; and 'modes of process' may be considered as equivalent to modes or manner of proceeding. If by the word process, Congress had intended nothing more than a general phrase, which might comprehend every other

paper issuing out of a court, the language would most probably have resembled that of the first section, where the word 'processes,' not 'process,' is used in that sense. But the introduction of the word 'modes,' and the change of the word 'processes' for 'process,' seems to indicate that the word was used in its more extensive sense, as denoting progressive action; a sense belonging to the noun in the singular number, rather than in the sense in which it was used in the first section, which is appropriate to the same noun in its plural number."

The learned Chief Justice supports this view by a consideration of other provisions of the section, and at the bottom of page 29 says: "As executions can issue only after a judgment, the words 'in suits at common law' must apply to proceedings which take place after judgment. But the legal sense of the word 'suit' adheres to the case after the rendition of the judgment, and it has been so decided."

Passing to a consideration of the Act of 1792, the learned judge says that the words " 'modes of proceeding in suits,' embrace the whole progress of the suit, and every transaction in it, from its commencement to its termination, which has been already shown not to take place until the judgment

shall be satisfied. It may then, and ought to be understood as prescribing the conduct of the officer in the execution of process, that being a part of the 'proceedings' in a suit." In the *United States vs. Halstead*, 10 Whea. 51, the same points were ruled.

In 1828 another Act was passed, the language of which was as follows: "The forms of mesne process, except the style, and the forms and *modes of proceeding* in suits, in courts of the United States, held in those States admitted into the Union since the twenty-ninth day of September, in the year seventeen hundred and eighty-nine, in those of common law, shall be the same in each of the States, respectively, as are now used in the highest court, of original and general jurisdiction of the same." (4 Stat. 278)

In *Beers vs. Houghton*, 9 Peters 329, 361, and *Ross vs. Duvall* 13 Peters 45, it is said, that this Act was passed shortly after the decision in the case of *Wayman vs. Southard, supra*, and was intended as a legislative sanction for the opinion in those cases, that the words "*modes of proceeding*" included all of the proceedings of the marshal upon an execution in his hands, down to the satisfaction of the judgment.

The same words are used in section 914, and must be taken with the same meaning.

II. It is interesting to observe the application of the rule to the circumstances of different cases. Thus in the case first above cited, of *Wayman vs. Southard*, the proceedings of the sheriff in the execution of the writ were all taken to be within those words.

In *Williams vs. Benedict*, 8 Howard 107, a judgment was recovered in the District Court of the United States for Mississippi, against the administrator of an insolvent intestate. The laws of that State directed, that where the insolvency of a decedent's estate is reported to the Probate Court, that court shall order a sale and distribute the proceeds among the creditors pro rata; and in the meantime no executions should issue upon a judgment rendered against such insolvent estate. The suit was a bill for an injunction to restrain the execution of the judgment, on the ground of this statute; and this court held the statute applicable.

In the *Bank of Tennessee vs. Horn*, 17 Howard 157, it was held that a state statute providing that all the property of an insolvent who made a voluntary assignment, should vest in the creditors from and

after the session and acceptance, effectually stood in the way of an execution and proceedings thereon, upon a judgment of the Federal Court.

Georgia vs. The Atlantic & Gulf R. R. Co., 3 Woods 434, was an application on behalf of the State of Georgia for leave to sell the depots, freight houses, passenger houses, and offices of the company, by virtue of a writ of *fieri facias* which had been levied on said property to enforce the collection of taxes due the State. The levy had been suspended by an affidavit of illegality filed by the company. The State statute provided: "When an execution has been levied on property, and an affidavit of illegality filed to stay proceedings thereon, the property so levied on shall be subject to levy and sale under other execution, and the officer making the first levy shall claim, receive, hold and retain such amount of the proceeds of the sale as the court shall deem sufficient to pay the execution first levied, including interest up to the term of the court at which said illegality shall be determined; and any bond given by the defendant, on filing such affidavit, shall be released and discharged, so far as relates to the property sold."

Mr. Justice Bradley delivered an elaborate opinion, in which he said: "the forms and *modes of*

procedure used in the United States Courts are precisely the same, in all cases at law, as those used in the State Courts," and under that rule he applied the statute to the case, and held that the property levied on was subject to other judgments and executions recovered in the federal court.

In Smith vs. Cockrill, 6 Wall. 756, a sale by the marshal upon execution issued out of the United States Circuit Court for Kansas upon a judgment recovered in that court, was held void because the officer did not appraise the premises as the state statute required.

In *Moncure vs. Zunts,* 11 Wall. 416, a like sale was held void, because the marshal did not advertise the sale as the State statute required.

In *United States vs. Knight,* 3 Sumn. 373, Mr. Justice Story, in an elaborate opinion, held that the state statute defining gaol liberties was in force in the federal courts as to judgment debtors.

III. But it is insisted that section 914 of the Revised Statutes does not authorize a summary judgment as against the surety on a stay bond, given by a judgment debtor in order to secure time for payment. There is a class of cases closely analogous to this, in which such remedies are sustained.

Hiriart vs. Ballon, 9 Peters 156, was a writ of error to the District Court of the United States for the Eastern District of Louisiana. The Act of Congress of May 26, 1824, (4 St. 62) provided that "the *mode of proceeding* in civil causes in the courts of the United States," in Louisiana, shall be conformable to the laws directing the mode of practice in the district courts of that State, with a proviso that the judge should have the power of making rules regulating the same. A rule was accordingly made providing that in all cases of affirmance of judgment on writs of error from judgments pronounced in this court, a rule may be taken on the principal and his sureties in the appeal bond, returnable ten days after recording the mandate of the supreme court, to show cause why execution should not issue against them; and no cause being shown, the judgment shall be entered against them and the principal, and execution issued accordingly. Ballon recovered a judgment in the United States District Court for Louisiana against one Gassies. Gassies appealed to this court and gave an appeal bond, upon which Hiriart was surety. The judgment was affirmed here, when, in pursuance of the rule above set forth, a motion was made in the circuit court that he show cause why judgment should not be entered

against him for the amount of the judgment, damages, interest and costs, and execution issue accordingly; and judgment was entered against him upon the bond. Mr. Justice Story delivered the opinion of the court, and said, at page 166:

"The principal point relied on seems to be that the party was entitled to a trial by jury, and that no such summary judgment is authorized by law. Whether this objection is well founded depends upon the act of Congress of the 26th of May, 1824, for the regulation of the practice of the district court of Lousiana. That act declares that *the mode of proceeding* in civil causes in the courts of the United States, in Louisiana, shall be conformable to the laws directing the mode of practice in the district courts of the States; with a power in the judge, to make rules to adapt such laws of procedure to the organization of the courts of the United States. The laws of Louisiana allow appeals from the district courts of the State, to the supreme court, upon giving an appeal bond, with security; and authorize a summary judgment upon such appeal bond, upon mere motion in the court from whence the appeal was taken, in execution of the judgment of the appellate court. The rule of the district court of Louisiana, therefore,

follows the analogy of the laws of Louisiana, being modified only so far as is proper to suit the organization of the courts of the United States, and to conform to the laws thereof. The summary judgment, therefore, was strictly authorized; and the party appellant had no right to a trial by jury. In becoming a security he submitted himself to be governed by the fixed rules which regulate the practice of the court. The judgment is affirmed, with damages, at the rate of six per cent, and costs."

Smith vs. Gaines, 93 U. S. 341, also came from the circuit court in Louisiana. Mr. Justice Miller, delivering the opinion of the court, and stating the facts that Mrs. Gaines had recovered a judgment against the city of New Orleans, against which the city appealed and gave a supersedeas bond, with Smith as surety, and the judgment was affirmed. In pursuance of the practice under the laws of the State, a rule was taken upon the sureties on the bond upon which judgment was entered against them. Without a discussion of the objection, the learned judge holds the judgment correct; and it was affirmed.

Amis vs. Smith, 16 Peters 303, was the case of a judgment recovered by Smith against Amis, upon

which an execution was issued; whereupon Amis, with Butterworth as security, gave a forthcoming bond, which, according to the laws of Mississippi, being duly forfeited, operated summarily as a judgment against the obligors in the bond on which execution could issue forthwith. Amis and Butterworth then moved the court to quash the bond, first, because it increased the costs not warranted by law, etc.; and, second, that there was no authority for taking the same, and it created a judgment against the obligors, precluding them from a defense, and a trial by jury. The motion was over-ruled, and Amis prosecuted his writ of error. Mr. Justice McKinley delivered the opinion of the court. At page 312 he recites the third section of the process act of 1828, and thereupon says: "We think this section of the act of 1828, adopted the forthcoming bond in Mississippi, as part of the final process of that state at the passage of the act. And we understand by the phrase 'final process,' all the writs of execution then in use in the state courts of Mississippi, which were properly applicable to the courts of the United States; and we understand by the phrase, '*the proceedings thereupon*' to mean, the exercise of all the duties of the ministerial officers of the states, prescribed by the laws of the state,

for the purpose of obtaining the fruits of judgments. And among these duties is to be found one, prescribed to the sheriff, directing him to restore personal property levied on by him, to the defendant, upon his executing a forthcoming bond according to law, and the further duty to return it to the court, forfeited, if the defendant fail to deliver the property on the day of sale, according to the condition of the bond. These are certainly proceedings upon an execution; and therefore, the forthcoming bond must be regarded as part of the final process. It aids materially in securing the payment of the money to satisfy the judgment; and it is part of the process by which the plaintiff is enabled to obtain the payment of the money secured to him by the judgment.

"But is this forthcoming bond a judgment as well as process? The statute declares that it shall have the force and effect of a judgment, simply, that an execution may issue upon it against the surety as well as the principal, and for all the costs incurred after the judgment. The same effect would have been produced if the statute had directed execution to issue upon the forthcoming bond, without giving it the force and effect of a judgment. The proceeding

which produced this bond was purely ministerial; the judicial mind was in no way employed in its production. It does not, then, possess the attributes of a judgment, and ought, therefore, to be treated in this court as final process, or at least, as part of the final process. With all due respect for the judicial decisions of State courts, we can not concede to those of Mississippi all that is claimed for them in this case."

Beall vs. New Mexico, 16 Wallace 535, was a writ of error to the supreme court of the territory of New Mexico. The statute of the territory provided that in case of appeal in civil suits, if the judgment by the appellate court be against the appellant, it shall be rendered against him and his sureties on the appeal bond. Judgment was recovered by the Territory against Beall, who appealed to the Supreme Court and gave an appeal bond conditioned that the appellant should perform the judgment of the court, and pay the damages and costs that might be adjudged against them in their said appeal. The Supreme Court of the territory affirmed the judgment, and rendered judgment against the appellants and sureties upon the appeal bond. One of the errors assigned here was, that judgment was entered by the Supreme Court against

the sureties on the appeal bond as well as against the appellants below. Mr. Justice Bradley delivered the unanimous opinion of this court. He said:

"The first error assigned is, that judgment was entered by the Supreme Court against the sureties of the appeal bond, as well as against the appellants below. This point depends on the question whether the statute of the Territory authorizing such a judgment is a valid one or not. As the legislative power of the Territory, by the organic act, extends to all rightful subjects of legislation consistent with the Constitution of the United States, it would seem to extend to such a case as this. A party who enters his name as surety on an appeal bond does it with a full knowledge of the responsibilities incurred. In view of the law relating to the subject, it is equivalent to a consent that judgment shall be entered up against him if the appellant fails to sustain his appeal. If judgment may thus be entered on a recognizance, and against stipulators in admiralty, we see no reason in the nature of things, or in the provisions of the Constitution, why this effect should not be given to appeal bonds in other actions, if the legislature deems it expedient. No fundamental constitutional principle

is involved; no fact is to be ascertained for the purpose of rendering the sureties liable, which is not apparent in the record itself; no object (except mere delay) can be subserved by compelling the appellees to bring a separate action on the appeal bond."

Moore vs. Huntington, 17 Wallace 417, also came here from New Mexico. A decree was rendered by the district court in favor of Huntington, against Moore. He appealed to the Supreme Court of the Territory, giving the usual bond with sureties, and that court affirmed the judgment, and entered judgment against the appellant and his sureties on the bond. Mr. Justice Miller, delivering the opinion of this court, says upon this subject, at page 422: "The decree was rendered in the Supreme Court jointly against the defendants and their sureties in the appeal bond, and it is alleged for error that no such judgment could be rendered against the latter. But there is no error in this. It is a very common and useful thing to provide by statute that sureties in appeal and writ of error bonds shall be liable to such judgment in the appellate court as may be rendered against their principals. This is founded on the proposition that such sureties, by the act of signing the bond,

become voluntary parties to the suit and subject themselves thereby to the decree of the court."

These cases are cited only for the purpose of showing that it is perfectly competent for a court to enter judgment against persons who make themselves parties to a litigation by signing bonds as sureties for one who seeks some advantage thereby, when the statute of the local jurisdiction authorizes such summary proceeding. They who lend themselves to a defendant in this way can not claim the constitutional right of trial by jury, or the advantage of any other inquiry.

We have now seen that the section 914, adopted into the jurisprudence of the federal courts in Nebraska the stay law of that State, and that the summary proceedings authorized by the statute are not open to objection. It follows, that the proceedings upon the judgment of Seymour against Young, to which Lamasters made himself a party by signing the judgment debtor's stay bond, justified the sale of the premises in question.

IV. But plaintiff in error insists that the law applicable to this case is not section 914, but is section 916, of the Revised Statutes. That section is as follows:

"The party recovering a judgment in any common law cause, in any Circuit or District Court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in all causes by the laws of the state in which such court is held, or by any such laws hereinafter enacted which may be adopted by general rules of such Circuit or District Court; and such court may from time to time by general rules adopt such state laws as may hereafter be enforced in such state in relation to remedies upon judgments as aforesaid, by execution or otherwise."

The contention is understood to be as follows: (1.) The general words of section 914, "practice, pleadings, forms and modes of proceedings," are to be applied to what is not within the particular words of section 916, "the party recovering a judgment shall be entitled to similar remedies on the same by execution or otherwise." That is to say, all of the modes of proceeding in a suit are governed by the former section, until judgment has been recovered; and thereafter the proceedings are governed by the latter section.

(2.) It follows that the stay law of the state was not incorporated into the jurisprudence of the Federal Court, because the section 916 was enacted in 1873 and the stay law was enacted in 1875; and no general rule of the Circuit Court had adopted the state statute when the proceedings here in question were had.

The premise of this contention is unsound, as appears from several considerations.

1. The first of these considerations arises upon the language of section 916, particularly as compared with the terms of section 914. We have already seen that the terms of section 914, as construed by this court in *Wayman vs. Southard, supra,* and other cases, are broad enough to include process of execution and all the proceedings of the officer thereunder. The terms of the section are: "Practice, pleadings, forms and *modes of proceeding.*" These words, "*modes of proceeding,*" standing alone, include what was done under this execution. Now let us proceed to consider the language of section 916. In order to support the contention of the plaintiff in error, its terms must be such as qualify those of the former section. Several words deserve notice.

(1.) Observe, in the first place, the object of the remedies which are provided by the section. It is expressly stated: it is "to reach the property of the judgment debtor." These words, "to reach the property of the judgment debtor," stand out prominently in the section, and alone give it character and precision. They do not secure any other benefit or advantage to either of the parties. They do not bring within the force of the section a proceeding of any sort which secures to either party a remedy by which any other advantage or protection is secured, such, for instance, as redemption by the debtor after the sale of his property. Consequently, when a bond is given by him, with sureties, to stay an execution against his property, by the terms of which they become bound in the same way and to the same extent as he is bound, execution against their property is not within the terms or purpose of the provision. The execution against the sureties is not issued to reach his property.

(2.) The parties in whose behalf the section is enacted are also to be noted. They are

the plaintiffs in judgments, and not defendants. The language is, "the party recovering a judgment shall be entitled to similar remedies upon the same, by execution and otherwise." The debtor is not the party in whose behalf the new remedies are provided. His interests are not within the words of the statute. Accordingly, the State statute giving him time for the payment of the judgment rendered against him, withdrawing his property temporarily from the process of the court, substituting for an execution issuing at once a security for the debt, is not within the terms or spirit of the section.

(3.) The nature of the new remedies supports the same view. The language is, "by execution or otherwise." It is not possible to say, that proceedings which arrest the officer in issuing the writ and in obeying its commands, is a remedy by execution. When a judgment is rendered for a sum of money, until execution is sued out the plaintiff can not be said to be exercising a remedy by execution. He may be entitled to it, but he has not availed himself of his right in that behalf. What the state statute

says is, that he shall not have it. Nor do the words, "or otherwise" reach farther; they apply to remedies of the same character as an execution, the object of which is to reach the property of the debtor and apply it to the satisfaction of the judgment; of which character are creditors' bills, proceedings supplementary to execution, garnishment of parties owing or holding the property of the judgment debtor, and other proceedings of like character, which within the last twenty-five years have been contrived in favor of plaintiffs. The terms of the section are abundantly satisfied by these new remedies, and ought not to be enlarged so as to trench upon and limit the significance of the words "modes of proceeding," in section 914.

2. The construction of the statutes, contended for by the defendant in error, is supported not only by a consideration of the precise terms of section 916, but by a consideration also of the prior legislation. The process Acts of 1789 and 1792 contain no provision relating particularly to executions, or any other mode of final process. All such writs and proceedings were covered by the general words,

"mode of process," and "mode of proceeding." There was no need of making provision for them. The same is true of the special statute of 1824, relating to the procedure in the courts of Louisiana. That act contained no terms but the general one, "mode of proceeding." It said nothing specially of executions, and yet it incorporated into the federal jurisprudence the state statutes relating to executions and proceedings thereon. Next comes the Act af 1828, passed, as we have already seen, for the purpose of giving legislative sanction to judicial construction. It contained the same general terms as the former acts. Its third section, however, provided specially for executions. Its language is, "writs of execution and other final process, issued on judgments and decrees rendered in any of the courts of the United States, and the proceedings thereupon, shall be the same, except their style, in each state respectively, as are now used in the courts of such state: *Provided,* however, that it shall be in the power of the courts, if they see fit in their discretion, by rules of court, so far to alter final process in said courts to conform the same to any change which may be adopted by the Legislatures of the respective states, for the state courts." This statute was never in terms repealed.

We come now to an interesting fact. In 1872 an act was passed "to further the administration of justice." (17 Stat. 196.) Its fifth section is as follows: "The practice, pleadings, forms and modes of proceeding in other than equity and admiralty causes, in the Circuit and District Courts of the United States, shall conform as near as may be to the practice, pleadings, forms and modes of proceeding existing at the time in all causes in the courts of record of the state within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding." The statute contained no provision relating to final process. Its general terms, "modes of proceeding," were sufficient to provide therefor. This provision superseded and in effect repealed the provision above cited of the act of 1828. Not only were its terms ample to provide for what was covered by the third section of the former statute, but it directly conflicted therewith. The proviso of the said third section vested in the courts the power at their discretion, by rule, to alter final process, so as to conform the same to changes which had been adopted by the state legislatures for the state courts. This power was taken from the courts by the act of 1872, and

it was made compulsory upon them to follow the State practice. We say, therefore, that it repealed the former act.

Thus we see, that in the latter year, executions and proceedings thereon followed the course of the State courts. Let this be illustrated. In the state of New York there was a statute on this subject, enacted before 1828, and therefore incorporated into the federal jurisprudence in that State. After that year, and before 1872, another statute was enacted in that State, providing for executions and proceedings thereon. It, however, by its own force had no influence upon the practice in the federal courts; but after 1828 rules were adopted giving it effect therein. In 1872 all these rules were superseded: they had no operation in the federal courts in New York, but the provisions of the statutes of the State, enacted in that year upon this subject, were put in force, and regulated final process, just as if they had been enacted by Congress.

Now let us proceed to consider what was done by the Revisors of 1873. Out of section five of the act of 1872 they made section 914 of the revision. Then they framed sections 915 and 916. Let it be noted from what source they took those

two sections. They are substantially the same as the sixth section of the act of 1872, which is as follows:

"In common law causes in the Circuit and District Courts of the United States, the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided for by the laws of the State in which such court is held, applicable to the courts of such State; and such Circuit or District Courts may, from time to time, by general rules, adopt such State laws as may be in force in the State in relation to attachments and other process; and the party recovering judgment in such cause shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided by the laws of the State within which such Circuit or District Courts shall be held in like causes, or which shall be adopted by rules as aforesaid; *Provided*, that similar preliminary affidavits or proofs, and similar security, as required by such laws, shall be first furnished by the party seeking such attachment or other remedy." (17 St. 197)

It is to be noted that this section relates only to attachment cases, or cases in which other process of a similar nature . issued. The terms are, "by

attachment or other process." The words "other process," according to one of the canons of statutory construction, means mesne process of like nature as attachments; such, for instance as garnishment. Another observation may be made. Two kinds of process are provided; first, mesne process, and second, final process. This appears from a cursory examination of the section. In the first part of it, provision is made for remedies by attachment or other like process; and then it is provided that "the party recovering judgment in such cause," that is, in attachment or other similar causes, "shall be entitled to similar remedies upon the same, by execution or otherwise."

Accordingly, we see that the act of 1872 leaves the matter of executions, except in attachment and other like cases, to be governed by section 5, as we have already explained.

Coming now to 1873, we find that the Revisors divided this section into two parts. They took the first part of the sixth section of the act of 1872 and made it section 915 of the revision; and they took the last part of the sixth section of the act of 1872 and from it framed section 916. But in this last section they changed the phraseology. They inserted in place of the words "in such cause,"

(that is in attachment and other like cases,) the words "in case of any common law cause;" so that, the new section is not limited to one class of judgments, but is applicable to all.

Now we are brought face to face with the question, whether the Revisors intended that the operation of the fifth section of the act of 1872 should be modified and limited by the slight change made in re-enacting the last clause of the sixth section of the same act; or did they mean to leave the terms of section 914 with all the force which they had under the settled judicial construction of its terms, and down to the time when they remodeled the statute, and to confine the terms of section 914 to such new remedies as had been devised by the State legislatures for the relief of judgment plaintiffs?

The answer cannot be doubtful. We are bound to say, that under the operation of section 914, the State statutes are incorporated into and made a part of the federal jurisprudence in the State, as well with reference to executions and the proceedings thereon as such other matters, as pleadings, amendments, times and orders of trial, and other like proceedings.

SECOND POINT.

But the question discussed above is not an open one between these parties. They were concluded upon it by the decision of the court when the sale was confirmed. The facts of this branch of the case are as follows; The execution against the original judgment debtor, Young, and his sureties on the stay bond, and among them Lamaster, was issued on the 14th of April, 1881. (p. 33) After appraisement and advertisement, on the 17th of May the marshal sold the property to Ewing for $5,600, and on the 19th he returned the execution with his proceedings endorsed thereon; on the 27th of the same month Lamaster filed in the court his motion, which is set forth at length on pages 36 and 37. In it he insists, among other reasons for setting aside the execution and sale: That he had not had his day in court, and that there was no judgment against him; that no judgment exists against him under and by virtue of which his property can be reached; that the levy and sale was not authorized by law, and there is no legal judgment upon which an execution could issue.

On the first of September an order was entered, in which it is stated that the cause was submitted to the court upon Lamaster's exceptions, and that

they were overruled. (p. 38.) What was agitated upon argument before the court appears in a bill of exceptions which the defendant saved at the time; and which will be found on pages 38 to 49 inclusive. On page 46 it is stated that Lamaster specified and pointed out among others, the following defects and insufficiencies in the sale; that there was no judgment upon which said execution could lawfully be issued, and no law or rule of Court authorizing the issue of said execution against the said Lamaster as surety.

It thus appears that the question discussed above was presented to the Court and necessarily ruled by it. This is an estoppel of record.

The statutes on this subject are the sections of title 14 of the Code of Civil Procedure, as follows:

"Sec. 498. If the court, upon the return of any writ of execution for the satisfaction of which any lands or tenements have been sold, shall, after having carefully examined the proceedings of the officer, be satisfied that the sale has in all respects been made in conformity with the provisions of this title, the court shall direct the clerk to make an entry on the journal that the court is satisfied of the legality of such sale, and an order that the officer make to the purchaser a deed of such lands and tenements, and the officer, on making

such sale, may retain the purchase money in his hands until the court shall have examined his proceedings as aforesaid, when he shall pay the same to the person entitled thereto, agreeably to the order of the court.

"Sec. 499. The sheriff or other officer, who, upon such writ or writs of execution, shall sell the said lands or tenements, or any part thereof, shall make to the purchaser or purchasers thereof, as good and sufficient a deed of conveyance of lands and tenements sold as the person or persons against whom such writ or writs of execution were issued could have made of the same at the time they became liable to the judgment, or at any time thereafter."

Under these sections we must presume that when the sale was made, Ewing paid to the marshal the sum bidden by him, which the marshal retained until the order of confirmation; at which time the money was paid by the marshal to the plaintiffs in the execution. As we have seen, a bill of execptions in due form was saved by Lamaster, but he did not pursue the matter farther. This is stated at the bottom of page 29 of the record.

The order of confirmation was appealable. This appears not only from its nature, it being a

final order or judgment, determining the rights of the parties, that is to say, Lamaster and Ewing, the plaintiff in the execution, but from the decisions of the Supreme Court of the State.

Parrat vs. Neleigh, 7 Neb. 456, was an appeal from an order confirming a sale. On page 459 it is said: "In an equity cause, as in an action at law, if a party desires to oppose the confirmation of a sale, he must file a motion setting forth the grounds on which he seeks to set the sale aside, and if the motion is overruled, he may appeal to this Court." And the order is not open to collateral attack. This follows necessarily from the fact that the order is appealable and final.

Day vs. Thompson, 11 Neb. 123, was an action to quiet title. Lands had been attached and sold under an order in the nature of an execution. On page 128 the Court says. "Here was an attachment properly levied, a judgment for the amount due, a sale of the attached property, a confirmation of the same, and an order for a deed. All this appeared on the records of the District Court, and so far as it affected the title to the lands in controversy, was notice to the world. * * The objection that no appraisment was made before the sale does not render the deed void, nor render the

order confirming the sale subject to attack in this collateral manner. If a motion to set aside the sale is still pending in the District Court, that is the proper tribunal to determine what disposition shall be made of it, but it can not be considered in this Court."

Mc Keighan vs. Hopkins, 14 Neb. 361, was ejectment, in which the validity of a title resting on a judicial sale was in question. After quoting at length several sections of the Code, requiring appraisment of real estate before its sale, on page 367 the Court says: "These provisions apply to all sales of real estate under the process of the Court, whether upon execution or order of sale. If the question of the validity of a sale in a case of this kind was before this Court for the first time, the writer would have no hesitation in holding the sale invalid; but from the earliest reported cases in this Court to the present time it has been held that an order confirming a sale can not be collaterally attacked. *Phillips vs. Dawley,* 1 Neb. 320; *Crowel vs. Johnson,* 2 Ib. 146; *State Bank vs. Green,* 8 Ib. 497; *Burkley vs. Lamb,* 8 Ib. 392; *Day vs. Thompson,* 11 Ib. 123. This being the construction adopted by this Court, it has become a rule under which rights and titles have been acquired, and if changed it should be done by the Legislature and not by the Court."

Neleigh vs. Keene, 16, Neb. 407 was also an ejectment, in which a sale was questioned, which was made under a decree of the United States Circuit Court, forclosing a mortgage, and made without an appraisment. On page 410 it is said: "Where the Court has jurisdiction, the confirmation of the sale cures all defects and irregularities in the proceedings, and such order can not be attacked collaterally. (Citing several cases.) This being the law, all the irregularities complained of, including the publication of the notice of sale, were cured by the confirmation, and the purchaser under the decree obtained all the plaintiff's title by the master's deed. The plaintiff, therefore, has no interest in the property, and can not mantain the action."

This Court has held the same doctrine in *Orchard vs. Hughes,* 1 Wall. 73, 76; *Blosom vs. Railroad Co.* Ib. 655; *Butterfield vs. Asher,* 91 U. S. 246.

But it is insisted that the objection to this sale went to the jurisdiction of the Court to issue the execution, and that that question can not be conclusively determined upon a motion to confirm the sale. The cases decided by the Supreme Court of Nebraska have, many of them, involved questions of much the same character. Thus, in the case of the *State Bank vs. Green,* 8 Neb. 297, execution

issued after and notwithstanding the filing of an efficient supersedeas bond; and this fact was alleged against the confirmation. The objection was sustained. On page 308 the Court says: "The power of the District Court to issue execution on the judgment was for the time being, suspended, and the clerk had no authority to issue the executions and orders of sale. The Court therefore erred in conforming the sale."

In *Finley vs. Bowers,* 9 Neb. 72, an appeal was taken from an order confirming a sale under a decree of foreclosure. The objection was, that the judgment, as recorded, differed from that actually pronounced by the court. This objection was deliberately considered and overruled.

In *Gilbert vs. Brown,* 9 Neb. 90, the objection was that service was not duly made of the original process by which the action was begun. The same objection was also made in *McMurry vs. Tuttle,* 13 Neb. 232.

In *Burkley vs. Lamb,* 8 Neb. 392, L. recovered a judgment against W. in the Probate Court for Lancaster County, and a transcript thereof was filed in the District Court on the 19th of November, 1873. Afterwards W. purchased the premises

in question and immediately conveyed them to his wife. After that, execution issued, and the premises were sold thereunder. The parties owning the premises at the time of the sale moved to set it aside, on the ground that the judgment was not a lien upon the premises. This motion was sustained, and no appeal taken. Thereafter the plaintiffs in the judgment sued out a second execution and levied it upon the same premises, whereupon the owners of the title brought their action to enjoin the sale. On page 398 the court says:

"That an order confirming or setting aside a sale is a final order will not be denied, and, under our code, may be reviewed by appeal or petition in error, the mode of reviewing the case being dependent on the character of the action. If a sale is set aside for a mere irregularity in making the sale, or from a failure to comply with the requirements of the statute, such order setting aside the sale will not prevent the land being again offered under the judgment. Where, however, a sale is set aside upon the ground raised distinctly in the motion, that the judgment was not a lien upon the land, and that no title will pass by the sale; such order, unless reversed, becomes final and conclusive upon the parties.

"In the case at bar, the very ground upon which the sale was set aside was, that the judgment was not a lien upon the lot in controversy. Can the plaintiff in execution disregard the order of the court and immediately offer the property again for sale? No one will contend that he can do so."

The opinion in *Schriber vs. Platt,* 19 Neb. 625, contains some expressions not in conformity with the rule above stated; but it appears that the plaintiffs were not parties to the original proceeding, but claimed a title which related back to a period before the judgment npon which the premises were sold, and were not before the court in any way when the order of confirmation was entered. It is very clear, therefore, that their title was not involved in that proceeding, and the language of the court is to be read with reference to these special facts.

Such, then, is the law in Nebraska, under its statutes; and wherever elsewhere a judicial sale must be confirmed by the court before it is effectual, the same rule obtains.

In the *Minnesota Co. vs. The St. Paul Co.,* 2 Wall. 609, a sale had been made by the marshal and confirmed by the court. It was insisted that the

decree did not authorize this sale, and that the order of confirmation did not have the effect to cover the omission. But Mr. Justice Miller, delivering the opinion of this court, says upon this subject: That a sale without a decree is a nullity and doubts if it can be made valid, "by a general order of confirmation;" and he says, page 640, "if, however, an issue had been made by exceptions, or other proper pleading, as to the question whether a particular piece of property had been included in the decree or order of sale, and the court had decided that it was so included, it might be an adjudication upon the construction of the decree, which would bind the parties. Nothing of the kind occurred here. There is every reason on the contrary to believe that the court had no suspicion that the marshal had sold more than the decree authorized."

Here, on the contrary, the very question was raised and determined, whether there was authority to issue the execution. That was the objection to the sale, stated by Lamaster in his motion to set it aside, urged by him on the argument, and overruled by the court.

We have here every element of estoppel by record. The subject matter, the identical question, and the parties are all the same here. The question

was as distinctly presented, as thoroughly considered and as decisively determined as it would have been in an action to which Lamaster and Ewing were parties, plaintiff and defendant. The only possible distinction which can be taken is the form of the proceeding.

If it be said that this distinction is vital, it must be because the proceeding is not according to the course of the common law, but is a special one prescribed by statute. But it is well settled that, when a court, even of inferior jurisdiction, exercising statutory powers, is called upon to determine whether it has jurisdiction, its decision on that subject is conclusive.

Mather vs. Hood, 8 John. 50, 51;
Griswold vs. Stewart, 4 Cow. 458;
Dyckman vs. The Mayor, 5 N. Y. 435, 440;
Sheldon vs. Wright, Ib. 497.

The circumstances call for a rigorous application of the rule. Under a process in due form of law issued out of a court of competent jurisdiction, and in the hands of the proper officer, the property in question was offered for sale. Upon the invitation thus extended to him, without collusion, without knowledge of any acts putting him upon inquiry, and relying solely upon the court under whose

authority the proceedings were had, Ewing bid for the property an adequate sum, paid the amount to the marshal, and awaited the action of the court. While the money was in the hands of the officer Lamaster objected to the validity of the sale, and in an orderly and sufficient manner litigated the question with the parties who claimed the money in the officer's hands. The court decided the question against him. It was competent for him to stay the payment of the money to the plaintiffs and the execution of the deed to Ewing, and remove the cause for review into this court. Had that course been pursued by him, and had this court finally decided the sale invalid, the money would have been restored to Ewing; and he would have suffered no loss but the use of his money in the meantime. The rights of all the parties would have been protected. Instead of that, Lamaster saw fit to hold his hands, suffer the order of confirmation to be executed, and Ewing's money pass beyond recall, either by him or by the court. Under such circumstances the plaintiff in error, upon the trial of this case, did not stand before the the Circuit Court, nor does he stand here, clothed with an equities, but entitled only to what the strict law will give him.

THIRD POINT.

If the court had jurisdiction to issue the execution and confirm the sale, or if the plaintiff in error is concluded upon those questions by the order of confirmation, then the other objections made by him in his motion to set aside the sale can not avail him. To argue them here would be merely a repetition of what has already been said.

FOURTH POINT.

The bond was the obligation of Lamaster. He insisted upon the trial that he was not bound by it. The question is presented in this way. The bill of exceptions, saved by him upon his motion to set aside the sale, contains his affidavit, which is found at the bottom of page 45, and in which he states that he signed the bond at the request of John Irwin, upon condition that two others should sign before it was delivered; that they did not do so, and on the evening of the same day he stated to Irwin that he wished to take his name from it, and refused longer to be considered a surety thereon. Thereupon he removed his name from the justification, he and Irwin at the time both supposing that he had removed it from the bond. On the trial of this cause he testified to the same thing, with

somewhat more particularity, his testimony appearing at page 25. Lamaster's brother Joseph, also testified to the same facts, as appears on pages 26 and 27.

It appears that the name remained to the bond, although the justification of Lamaster was removed therefrom. The bond was introduced in evidence by the defendant on the trial, and appears at pages 53 and 54, and shows the name of Lamaster among the sureties, and the justifications of all but him.

The court directed the jury that, being perfect on its face, and apparantly executed by all whose names appear thereto, and among them by Lamaster, without blanks for other names, or other defects or deficiencies, the instrument bound Lamaster; and that the circumstances detailed in the testimony above recited, unless communicated to the clerk or the plaintiff, did not relieve him from liability. (p. 31).

On the other hand, the defendant requested the court to instruct the jury otherwise, which the court refused.

The failure of Irwin to perform the condition on which Lamaster signed the bond, that is, to obtain the signatures of two other persons, is not a defense.

Dair vs. United States, 16 Wall. 1.

And the attempt of Lamaster to remove his name from the bond, after having placed it there and taken the usual affidavit of justification as to his property, will not release him. Whatever his intention, he was heedless in his effort to remove his name, and must answer for the consequences. In the case last cited the principle is well stated.

"It must be conceded that courts of justice, if in their power to do so, should not allow a party, who by act or admission has induced another with whom he was contracting to pursue a line of conduct injurious to his interests, to deny the act or retract the admission in case of apprehended loss. Sound policy requires that the person who proceeds on the faith of an act or admission of this character should be protected by estopping the party who has brought about this state of things, from alleging anything in opposition to the natural consequences of his own course of action. It is, accordingly, established doctrine, that whenever an act is done or statement made by a party, which can not be contradicted without fraud on his part and injury to others, whose conduct has been influenced by the act or admission, the character of an estoppel will attach to what otherwise would be mere matter of evidence."

Here we find Lamaster signing a bond, upon which the clerk of the court must necessarily act, relying upon his promises therein; and not only so, but making an affidavit as to the amount of his property in order to induce the officer to accept him as surety. Thereafter he makes an effort to remove his name, but does not do so. He leaves the instrument in the hands of the party at whose request he has made it, who secures an advantage from it. The clerk makes the proper entries in the judgment index against the name of Lamaster, and the plaintiff in the judgment is obliged on account thereof to wait for the sum which he has recovered. Thus having by his own act, deprived the plaintiff of an advantage, he can not excuse himself by his heedlessness.

Objection is further made to the bond, because the statute requires that the surety justify as to his property, by affidavit in respect thereto; and when the bond was filed with the clerk, Lamaster's affidavit was not attached thereto. But we know that the bond was taken and approved by the clerk and acted upon by him on the strength of Lamaster's name as well as of the other sureties. This appears from the fact that he extended the same against Lamaster, as the statute required. The direction

of the statute, that the surety justify as to his property, is for the information of the clerk and the benefit of the plaintiff, and not the relief of the surety. Accordingly, he can not escape his liability by alleging that he did not do what might have been required of him before he was accepted by the clerk.

An attempt was made on the trial to avoid the bond, by the testimony of Joseph Lamaster, tendered, as appears on page 27, to show that the clerk in approving it did not take the name of Lamaster into his consideration, and noticed that his justification had been removed. The testimony was objected to, and the court properly rejected it, for several reasons. The testimony was hearsay and contradicted the record; for the plaintiff had produced the judgment index in which, in pursuance of the statute, the judgment had been extended against Lamaster, showing that he must have relied upon him as a surety as well as upon the others. The fact that his justification had been removed was not a circumstance to which the clerk would give heed, as long as the signature to the principal instrument remained.

Again, the defendant sought to avoid the execution, by showing that the amount for which it issued

had been changed, and that he did not know of it until his property had been sold. This testimony, as tendered by the plaintiff in error was hearsay, and if a change had been made in the writ between its issue and the return, the fact must have appeared on its face. Besides, Lamaster was concluded upon this, as well as upon all the other matters which he brought forward on his motion to set aside the sale, by the order of confirmation.

FIFTH POINT.

It was not error for the court to refuse to reduce his charge to the jury to writing.

Nudd vs. Burroughs, 91 U. S. 426, 441.

Vicksburg R. R. Co. vs. Putnam, 118 U. S. 545.

Martindale vs. Waas, 11 Fed. Rep. 551; 3 Mc Crary, 637.

SIXTH POINT.

The attack upon the jurisdiction was a failure. The plaintiff in error himself showed on the trial, by the testimony of Keeler, that the conveyance by Ewing to him passed the whole title, in equity as well as at law, and that Ewing retained no right or interest in it. Furthermore, irrespective of the

citizenship of the parties, the Circuit Court had jurisdiction of the case because it arose under the laws of the United States. It was not simply an action upon a judgment of the Federal Court, within the doctrine of the *Providence Savings Society vs. Ford,* 114 U. S. 635, but was an action for the recovery of a title, the validity of which was to be determined by the construction of the Acts of Congress. The title alleged by the plaintiff below, and denied by the defendant, depended upon the construction of the federal statutes, and would be defeated by one construction and sustained by the opposite construction.

Cohens vs. Virginia, 6, Wheat. 264, 379.

Osborne vs. Bank of United States, 9 Ib. 737, 824.

The Railroad Co. vs. Mississippi, 102 U. S. 135, 140.

The Kansas Pacific vs. Atchison R. R., 112 U. S. 114, 116.

Starin vs. New York, 115 U. S. 248.

Mayor vs. Cooper, 6 Wall. 247.

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